(9)

No. 93-1197-CFX
Status: GRANTED

Title: Albert Hess and Charles F. Walsh, Petitioners
v.
Port Authority Trans-Hudson Corporation

Docketed:
January 25, 1994

Court: United States Court of Appeals for
the Third Circuit

Counsel for petitioner: Katz,Lawrence A.

Counsel for respondent: Burke,Donald, Welsh,Hugh H.

Entry	Date	Note	Proceedings and Orders
1	Jan 25 1994	G	Petition for writ of certiorari filed.
2	Feb 24 1994		Brief of respondent Port Authority Trans-Hudson Corporation in opposition filed.
3	Mar 2 1994		DISTRIBUTED. March 18, 1994 (Page 15)
4	Mar 21 1994		Petition GRANTED. limited to the following question: "Whether Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of a bistate agency created by interstate compact, is entitled to sovereign immunity from suit in federal court under the Eleventh Amendment?"
			**********
5	Apr 20 1994	G	Motion of petitioners to dispense with printing the joint appendix filed.
6	May 2 1994		Motion of petitioners to dispense with printing the joint appendix GRANTED.
7	May 4 1994		Brief of petitioners Albert Hess, et al. filed.
8	May 4 1994		Brief amicus curiae of Railway Labor Executives'Association filed.
10	Jun 6 1994		Order extending time to file brief of respondent on the merits until June 15, 1994.
11	Jun 15 1994		Brief of respondent Port Authority Trans-Hudson Corporation filed.
13	Jun 15 1994		Brief amici curiae of Council of State Governments, et al. filed.
15	Jun 15 1994		Brief amici curiae of New Jersey, et al. filed.
12	Jun 16 1994	G	Application (A93-1051) to extend the time to file a reply brief from July 18, 1994 to July 25, 1994 by petitioners, submitted to Justice Souter.
14	Jun 18 1994		Application (A93-1051) granted by Justice Souter extending the time to file until July 25, 1994.
16	Jul 12 1994		CIRCULATED.
18	Jul 20 1994		SET FOR ARGUMENT MONDAY, OCTOBER 3, 1994. (3RD CASE).
17	Jul 22 1994	X	Reply brief of petitioner filed.
19	Aug 9 1994		Record filed.
		*	Original record proceedings U. S. District Court for the District of New Jersey.
20	Aug 10 1994		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Third Circuit.

1 PP

Supreme Court, U.S.
FILED

No. 93-1197

JAN 25 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May Respondent, Port Authority Trans-Hudson Corporation (PATH), an entity created by an interstate compact, defeat an injured railroad employee's right to bring an action, under the Federal Employers' Liability Act, in a federal district court, by asserting immunity from federal court suit under the Eleventh Amendment to the United States Constitution, a defense allowed PATH by the United States Court of Appeals for the Third Circuit, in direct conflict with the United States Court of Appeals for the Second Circuit, even though no judgment against PATH will impact the state treasury of either of the compacting states and even though the statutory structure of PATH indicates that it is not the arm of either of the compacting states?

2. Should Port Authority Trans-Hudson Corporation (PATH), an entity created by an interstate compact, be able to defeat an injured railroad employee's right to bring an action, under the Federal Employers' Liability Act, in a federal district court, by asserting immunity from federal court suit under the Eleventh Amendment to the United States Constitution, even though the action is brought against an interstate compact entity pursuant, to the district court's federal question jurisdiction by citizens of its own state?

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No.

Supreme Court of the United States

October Term, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

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PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Albert Hess and Charles F. Walsh, respectfully petition for a writ of certiorari to review judgments of the United States Court of Appeals for the Third Circuit in the above-captioned consolidated cases.

OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals in *Albert Hess v. Port Authority Trans-Hudson Corporation*, consolidated with, *Charles F. Walsh v. Port Authority Trans-Hudson Corporation*, (App., *infra*, 1a-2a), consists solely of a Judgment Order summarily affirming, without comment or analysis, the opinions rendered by the United States District Court for the District of New Jersey. The Court of Appeals' decision is reported at the table in 8 F.3d 811 (3d Cir. 1993). The District Court opinion in *Hess* (App. C, 5a-33a) is reported at 809 F.Supp. 1172 (D.N.J. 1992). The District Court opinion in *Walsh* (App. E, 35a-41a) is reported at 813 F. Supp. 1095 (D.N.J. 1993).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals, in the consolidated cases, was entered on September 30, 1993. (App. A, 1a-2a). A petition for rehearing and rehearing en banc was denied on October 27, 1993. (App. F, 42a-43a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Federal Employers' Liability Act, provides for the jurisdiction of federal district courts at 45 U.S.C. § 56, which reads:

> No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.
>
> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Additionally, portions of the Compact and subsequently enacted bi-state legislation is found at N.Y. Unconsol. L. §§ 6101 *et seq.* and N.J.S.A. §§ 32:1-1 *et seq.* The New York statutes are identical to the New Jersey statutes. Only the New York statutes are reproduced at App. G, 45a-58a.

STATEMENT OF THE CASE

The Petitioners, Albert Hess (a New Jersey citizen) and Charles F. Walsh (a New York citizen), were employees of Port Authority Trans-Hudson Corporation (PATH) at the time of their respective accidents. Mr. Hess was a locomotive engineer. On June 29, 1987 he sustained injuries when the train's window malfunctioned and struck his right hand. Mr. Walsh was a railroad conductor. On October 6, 1986 he was injured when a passenger train door malfunctioned and slammed into his right wrist and arm. Each employee sustained personal injuries because of the malfunctioning railroad equipment.

PATH is an interstate railroad operating trains between the states of New York and New Jersey. PATH is a wholly owned subsidiary of the Port Authority of New York and New Jersey. The Port Authority, and thus PATH, are entities created by an interstate compact between the states of New York and New Jersey and consented to by the United States Congress. *See Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 300-301 (1990)(cited as *Feeney*).

Because Mr. Hess and Mr. Walsh were employed by an interstate railroad at the time of their injuries, and further, because they alleged that their respective injuries were caused by, *inter alia*, the negligence of PATH, their railroad employer, they filed actions pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq*. The Hess Complaint was filed on May 31, 1990. The Walsh Complaint was filed on May 9, 1989. Both complaints were filed within the three-year statute of limitations established by 45 U.S.C. § 56. Both complaints were filed more than one year after the respective accidents.

PATH filed Motions to Dismiss in the District Court. The Motions raised an Eleventh Amendment immunity defense from suit in federal court. The Motions asserted non-compliance with an alleged condition precedent to suit in federal court, N.Y. Unconsol. Laws § 7107 (N.J.S.A. § 32:1-163), that provides:

> The foregoing consent to suit is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefore shall have accrued. . .

Therefore, although the complaints were filed within the three-year statute of limitations established by the FELA, PATH

asserted that suit in federal court must be filed within one year after an accident.

The District Court in *Hess* assumed that PATH was an entity entitled to assert Eleventh Amendment immunity. It relied on the Third Circuit's opinion in *Port Authority Police Benevolent Association, Inc. v. Port Authority Trans-Hudson Corporation* (hereinafter cited as *PBA).*, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), and other opinions, to find that PATH was entitled to Eleventh Amendment immunity. (15a-16a). The District Court in *Walsh* also relied on *PBA* in holding that PATH was entitled to assert Eleventh Amendment immunity. (37a). Each District Court also held that N.Y. Unconsol. Laws § 7107 (N.J.S.A. § 32:1-163) placed a restriction upon PATH's waiver of Eleventh Amendment protection found by this Court in *Feeney* and that the waiver was only effective if suit was brought within one year of the accident. Because, in each case, suit was brought more than one year after the accidents, each case was dismissed. (App. B, 3a-4a and App. D, 34a).

The Third Circuit panel affirmed, without comment or analysis, both District Court dismissals. The Third Circuit refused rehearing or en banc consideration of the issues. (App. F, 42a-43a). At oral argument, and in the Petition for Rehearing, the Third Circuit was advised that its decision was in direct conflict with decisions of the United States Court of Appeals for the Second Circuit. *See Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990). The Third Circuit was aware of this conflict, as it was the subject of this Court's review in *Feeney*. Because the three-year statute of limitations has run in each case, the Petitioners are left without a remedy unless the Court grants this Petition.

REASONS FOR GRANTING THE WRIT

I.

THERE IS A DIRECT CONFLICT BETWEEN THE THIRD CIRCUIT BELOW AND THE SECOND CIRCUIT ON THE ISSUE OF WHETHER PATH IS ENTITLED TO ASSERT AN ELEVENTH AMENDMENT DEFENSE FROM SUIT IN FEDERAL COURT.

This Court has previously recognized that an irreconcilable conflict exists, between the Courts of Appeals for the Third and the Second Circuits, on the issue of whether PATH is an entity entitled to assert Eleventh Amendment immunity from suit in federal court. In *Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299 (1990), the Petition for Certiorari raised two questions. The first was identical in substance to the first question in this Petition: Is PATH entitled to assert an Eleventh Amendment defense from suit in federal court? The second issue was whether PATH had waived its Eleventh Amendment protection. Certiorari to the Second Circuit was granted. In *Feeney*, this Court observed that the Second Circuit had held that PATH was not an Eleventh Amendment entity, and therefore, that it could not assert immunity from suit in federal court. The Third Circuit, viewing PATH totally differently, held that PATH was an Eleventh Amendment entity that could assert immunity from suit in federal courts. The Second and Third Circuits also disagreed on whether PATH had waived any Eleventh Amendment immunity that it may have had. The Second Circuit ruled that it had waived immunity; the Third Circuit held that it had not. *Feeney* at 300-304. This Court did not address the first question, whether PATH was the kind of entity entitled to assert Eleventh Amendment immunity, because this Court found that the states had consented to suit in federal court. *Id.* at 305. The conflict on the first question remains unresolved.

Now, this issue again raises its ugly head. Injured railroad employees who file their FELA lawsuits in Second Circuit courts are treated differently than employees who file their lawsuits, against the same railroad, in Third Circuit courts. Employees of the same railroad, possibly even members of the same crew who were involved in the same accident, are treated differently. For example, if two crew members, injured in the same accident, file their lawsuits in different courts, the employee filing his Complaint in a Second Circuit court may do so any time before the three-year statute of limitations established by the FELA, 45 U.S.C. § 56. The employee, filing in a Third Circuit court, will have his case dismissed unless it is filed within one year of the accident. This conflict between the Third and Second Circuits, results in the same federal law being applied differently to similarly situated employees, solely because of the district court that they chose as their forum. This conflict effectively reduces the federally mandated statute of limitations, if an employee chooses to file his Complaint in federal court in the Third Circuit, but not in the Second Circuit. These conflicting decisions, on whether PATH is entitled to assert Eleventh Amendment immunity from suit in federal court, create a situation of confusion and an irrational disparate treatment of similarly situated injured employees.

This confusion and disparate treatment is particularly troublesome because it involves significant areas of constitutional and federal law. Constitutionally, two Circuits apply the Eleventh Amendment to the United States Constitution in opposite ways to the same railroad, where all factors are the same except the forum where suit is brought. Further, this non-symmetrical application of the law, by the Third and Second Circuits, takes place in the context of FELA cases. This Court has consistently held that uniform interpretation is a goal of the FELA and is a necessity. *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942); *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359, 361 (1952). "When a

federal law is the source of the plaintiff's claim,[1] there is a federal interest in defining the defenses to that claim, including the defense of immunity." *Ferri v. Ackerman*, 444 U.S. 193, n. 13 (1979), citing, *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). Such a federal interest is present in the instant cases.

The question, whether PATH is entitled to assert Eleventh Amendment immunity, has not yet been settled. It is an important question because of the confusion and disparate treatment caused by the conflict between the Third and Second Circuits. It is an important question because of the lack of uniformity it places into FELA law. Petitioners respectfully submit that this confusion and disparate treatment can only be eliminated by a decision of this Court.

A. The Third Circuit's Decision That PATH Is An Entity Entitled To Assert Eleventh Amendment Immunity Is Contrary To, And In Conflict With, Decisions Of This Court. The Second Circuit's Decision Concerning PATH Is In Accord With Decisions Of This Court. This Conflict Is A Result Of The Third Circuit's Faulty Interpretation Of PATH's Enabling Compact.

This Court has held that an interstate compact entity is not

1. The claims of the Petitioners, in the District Courts, arose from federal law. As employees of an interstate railroad each had the right to sue his employer, PATH, to recover money damages for personal injuries sustained as a result of PATH's negligence or faulty equipment. Section 56 of Title 45, U.S.C. (A45), further gave the Petitioners the right to choose as their forum either a federal court or a state court. Section 56, enacted as Section 6 of Public Law 117 (1910), 36 Stat. 291, specifically expanded the federal courts where an injured employee could bring his FELA action. This was enacted because Congress felt that the original Act was "too restrictive" of the right of the employee to choose the federal court in which to bring suit. *H.R. Report 613, accompanying H.R. 1639, from the Committee on Judiciary*, June 19, 1947, p. 2.

entitled to Eleventh Amendment immunity from suit in federal court simply by virtue of the fact that it was created by two states. In *Lake Country*, where this Court analyzed an interstate compact entity created by the states of California and Nevada,[2] this Court held,

> By its terms, the protection afforded by the Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'
>
> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading

2. The Tahoe Regional Planning Agency (TRPA).

> additional meaning into the limited language of the Amendment.

Id. at 401.

This Court's conclusion in *Lake Country*, that the Amendment should be applied to interstate compact entities only where it is necessary "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself," *Id.*; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, n. 34 (1984), *citing, Lake Country*, is consistent with its other decisions. *See Edelman v. Jordan*, 415 U.S. 651, 663, 668 (1974)("Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945)("...when the action is in essence one for the recovery of money against the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit . . .").

The Third Circuit has not followed these decisions. Instead, it has permitted PATH to assert an Eleventh Amendment defense, even though any judgment against PATH will not, and cannot, be paid from the treasuries of either New York or New Jersey.

The District Courts, in the cases of these two Petitioners, relied on the Third Circuit decision in *PBA*. *PBA* held that PATH was entitled to assert Eleventh Amendment immunity from suit in federal court. The Third Circuit Court of Appeals, in the *Hess* and *Walsh* cases, ratified the District Courts' reliance on *PBA* by its summary affirmance of the District Courts' dismissal of the two FELA actions.

The Third Circuit, in *PBA*, reached an incorrect result and one that is in conflict with decisions of this Court and in direct conflict with the Second Circuit, *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), because it did not fully or properly read the Compact creating PATH.

In *PBA*, the Third Circuit addressed the impact on the state treasury and held,

> Indirectly, then, a judgment against the Authority could have some impact on the state treasury. Although the fiscal health presently enjoyed by the Port Authority renders this conclusion purely theoretical, Compact Article XV nevertheless makes the states' intentions towards the Authority crystal clear: if the Authority is ever in need of financial support, the states will be there to provide it.

Id. at 416.

The Third Circuit, in *PBA*, cited Compact Article XV as follows:

> Unless . . . the revenues from operations are adequate to meet all expenditures, the legislatures of the two states shall be appropriate [the amounts needed].

Id. at 416.

The Third Circuit's error was not fully quoting the statutory provision. The quotation, as it appears in *PBA*, is misleading. Because the Third Circuit relied on an incorrect

statement of the statute, its conclusion, based on that incorrect statement, was wrong and contrary to the decisions of this Court and the Second Circuit.

Compact Article XV *actually reads* as follows:

> Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislature of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority *and approved by the governors of the two states*, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

(Emphasis added) (Uncon. Laws of N.Y. § 6416) (48a).

Contrary to the Third Circuit's statement in *PBA*, there is no obligation for either state to make appropriations from their treasuries to make up a cash shortfall caused by any judgment rendered against PATH. The treasuries of either state can only be reached by the *voluntary* actions of the states. If the Governors of both states do not approve appropriations, and they are not required to approve them, the states are not obligated to make appropriations to PATH. Voluntary payments, by a state to meet shortfalls caused by judgments against an agency, do not trigger sovereign immunity. *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 661 (en banc)(3d Cir 1989), *cert. denied*, 493 U.S. 850 (1989).

Thus, on the critical issue of whether a judgment liability must be paid from public funds in the state treasury, the Third Circuit in

PBA was in error. This error was repeated by the Third Circuit in the cases now before the Court in this Petition. If this error is not corrected by this Court, the Third Circuit will continue to apply the Eleventh Amendment contrary to decisions of this Court, and in conflict with the Second Circuit. It will perpetuate a lack of uniformity in FELA cases.

The Second Circuit, in finding that PATH was not an entity entitled to assert Eleventh Amendment immunity, properly interpreted the statute and held,

> In cases where doubt has existed as to the availability of Eleventh Amendment immunity, the Supreme Court has emphasized the exposure of the state treasury as a critical factor. In *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662, *reh'g. denied*, 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed.2d 777 (1974), for example, the Supreme Court stated that "[i]t is ... well established that even though a State is not named a party to the action, the suit may nonetheless be barred by the Eleventh Amendment.... [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment." Id. 415 U.S. at 663, 94 S.Ct. at 1355 (citations omitted); *see also Lake Country*, 440 U.S. at 400-01, 99 S.Ct. at 1176-77.
>
> We believe it clear that a judgment against PATH would not be enforceable against either New York or New Jersey. The Port Authority is explicitly barred from pledging the credit of

either state or from borrowing money in any name but its own. Even the provision for the appropriation of moneys for administrative expenses up to $100,000 per year requires prior approval by the governor of each state and an actual appropriation before obligations for such expenses may be incurred. Moreover, the phrase "salaries, office and other administrative expenses" clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port Authority's operating and capital expenses, including personal injury judgments. No provision commits the treasuries of the two states to satisfy judgments against the Port Authority, therefore. We believe that this insulation of state treasuries from the liabilities of the Port Authority outweighs both the methods of appointment and gubernatorial veto so far as the Eleventh Amendment immunity is concerned.

We realize that our holding creates a conflict between ourselves and the Third Circuit regarding PATH, see *Port Authority Police Benevolent Ass'n., Inc. v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3d Cir.), *cert. denied*, __ U.S. __, 108 S.Ct. 344, 98 L.Ed.2d 370 (1987), that can be resolved only by the *632 Supreme Court. That decision, however, was based on the Third Circuit's understanding that in the event that "a judgment were entered against the Authority

that was serious enough to deplete its resources, the Authority would be able to go to the state legislatures in order to recoup the amount needed for its operating expenses." *Port Authority Police Benevolent Ass'n.*, 819 F.2d at 416. To the extent that this statement implies that the states must make such an appropriation, it appears to be in error. Under the compact, states are obligated to provide funds for Port Authority administrative expenses up to $100,000 only if their respective governors approve the request. Judgments in the present action thus cannot lead to a depletion of state treasuries without gubernatorial consent.

Feeney (2d Cir.) at 631-632.

Four members of this Court, in *Feeney (S.Ct.)* at 316-318 (Justices Brennan, Marshall, Blackmun and Stevens, concurring), agreed that the Second Circuit was correct, and thus that the Third Circuit was in error, and those Justices would have also found that PATH is *not* an entity entitled to assert Eleventh Amendment immunity. It is respectfully submitted that the entire Court should now resolve this serious conflict between the Third and Second Circuits.

B. The Third Circuit's Decision That PATH Is An Entity Entitled To Assert Eleventh Amendment Immunity Is Contrary To, And In Conflict With, Decisions Of This Court. PATH Is Not The Type Of Entity Entitled To Assert Eleventh Amendment Immunity From Suit In Federal Court.

This Court recognized, in *Lake Country*, that the purpose of extending the Eleventh Amendment immunity to a state associated entity is "to protect the state treasury from liability that would have

had essentially the same practical consequences as a judgment against the State itself," *Lake Country* at 401; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, n. 34 (1984), *citing, Lake Country.* When the fiscal character of Port Authority of New York and New Jersey (and its fully owned subsidiary, PATH) is analyzed, it becomes evident that PATH is not an agency of either New York or New Jersey, and is not entitled to any Eleventh Amendment protection. An analysis of PATH's fiscal structure confirms that the Third Circuit's decisions in *PBA* and in these cases are incorrect and that PATH, as the conflicting decision in the Second Circuit[3] holds, is not entitled to Eleventh Amendment immunity.

PATH's money does not predominantly come from the states. As the Port Authority has stated,

> The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction and acquisition of facilities upon the basis of its own credit.

(60a).

The Port Authority Comprehensive Financial Report (App. H, 59a-63a). reports an increase in gross operating revenues and states that this is "primarily attributable to the effort of" toll increases and higher flight fees. (60a-61a). At another portion, the Port Authority reports,

> The costs of providing facilities and services to the general public on a continuous basis are

3. *Feeney (2d Cir.).*

> recovered primarily in the form of tolls, fares, fees, rentals and other user charges.

(62a).

The Report also documents,

> The Port Authority finances construction and acquisitions of the facilities primarily by issuing bonds, notes and other obligations and through application of its reserve fund.

(63a).

Additionally, the Port Authority reports funding through its portfolio management. There is reported $47,000,000.00 of earnings on long-term investments and $27,649,000 of earnings on short-term investments. (61a).

See also, Unconsolidated Laws of New York, § 6459 (49a) (reference to authority of Port Authority to issue bond and securities); § 7053 (55a-57a) (authorizing Port Authority to issue bonds as the general obligations of the Port Authority); § 7002 (54a-55a) (establishing a general reserve fund to place surplus revenues to be used to pledge as security or to be used for its undertakings).

The Port Authority is, as the Compact envisions, "financially self-sustaining." (60a). Its money does not come from the states and, therefore, it is not entitled to any Eleventh Amendment immunity.

Equally, if not more important than the fact that the Port Authority's money does not come from any state, is the nature of the states' obligation to PATH. The States of New York and New

Jersey do not appropriate money for the Port Authority. Further, and of vital import, a judgment against Port Authority/PATH *will not* impact on the treasury of either state. Article VII of the Bi-State Compact (N.Y. Uncon. Laws § 6408) (47a) clearly commands:

> The Port Authority *shall not* pledge the credit of either state except by and with the authority of the legislature thereof.

(Emphasis added).

The Comprehensive Financial Report states,

> The agency neither has the power to pledge the credit of either state or any municipality . . .

(60a).

See also, N.Y. Uncon. Laws § 6459 (49a-50a) (" . . . it shall have no power to pledge the credit of either state or to impose any obligation upon either state or municipality . . ."); § 7053 (55a-57a) ("bonds . . . shall be direct and general obligations of the Port Authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof").

Any appropriation by either New York or New Jersey, in response to a judgment against Port Authority/PATH, is solely discretionary. That does not trigger Eleventh Amendment immunity. As in *Lake Country*, a judgment against Port Authority/PATH is not enforceable against any state.

Further evidence that a judgment against PATH is not a judgment against either of the compacting states is the existence of insurance. In a section titled, "Risk Management," it reports that the Port Authority carries both ordinary insurance and excess

public liability insurance. Further, it "provides for uninsured potential losses through its self-insurance program by appropriation from the Consolidated Bond Reserve Fund to the Operating Fund and by charging operating expenses as incurred." (62a).

Accordingly, as the Second Circuit and four Justices of this Court have held, the funding/fiscal elements demonstrate that Port Authority/PATH is not entitled to Eleventh Amendment protection. The Third Circuit's contrary decisions are incorrect. The granting of this Petition is necessary to resolve this conflict and to bring the Third Circuit's decisions in line with the decisions of this Court.

PATH, like the entity reviewed in *Lake Country*, is established as an autonomous entity with significant independent powers. It is, therefore, not entitled to Eleventh Amendment immunity.

The Port Authority, by statute, has a separate corporate existence. The significance of this designation is that only a state is entitled to Eleventh Amendment immunity, and not municipalities and political subdivisions. *Lake Country* at 400-401. The Port Authority/PATH is more akin to a political subdivision than a state. The Port Authority/PATH explicitly characterizes itself as a "political subdivision." (59a). Further, it is established as "body corporate and politic." (Article III of Compact: N.Y. Uncon. Laws § 6404) (45a), constituting a "body, both corporate and politic..." (Art. VI of Compact: N.Y. Uncon. Laws § 6407) (46a-47a). It is also referred to by statute as a "municipal corporate instrumentality of the two states." N.Y. Uncon. Laws § 6459 (49a). In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), this Court discussed the designation of "bodies politic and corporate." It held that the designation did not include the state, but only private or municipal corporations. *Id.* at 68, n. 9. PATH's own characterization of itself, and the designation as a "body corporate

and politic", is clear proof that the Port Authority/PATH was established to be akin to a political subdivision or municipality, and therefore, is not entitled to Eleventh Amendment immunity.[4]

Other indicia of its autonomy is that the Port Authority/PATH can sue and be sued (N.Y. Uncon. Laws §§ 7101, 6612, 6466) (57a, 51a-54a, 50a-51a); can enter into contracts (N.Y. Uncon. Laws § 6612) (51a-54a) ("all details of the effectuation, including . . . contracts . . ., shall be within its sole discretion . . "); and can purchase, sell or lease land, or own and hold real or personal property (Art. VI of Compact: N.Y. Uncon. Laws §§ 6407, 6951) (46a-47a, 54a).

As was the entity in *Lake Country*, PATH has significant authority to make its own rules and regulations, and to enforce them. Relevant portions of its enabling act are as follows:

> The Port Authority . . . is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either state, to effectuate the [comprehensive plan], except the power to levy taxes or assessments.

(N.Y. Uncon. Laws § 6459) (49a-50a).

Another provision of its effectuating statute provides:

> All details of the effectuation, including but not limited to details of financing, leasing, rentals,

4. *See also, Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998 (2d Cir 1944), *cert. denied*, 323 U.S. 792 (1945) (Found that the Port Authority was a political subdivision under the IRS code permitting its bonds to produce tax free income).

> tolls, fares, fees and other charges, rates, contracts and services . . . shall be within its sole discretion and its decision . . . shall be controlling and conclusive.
>
> So long as any facility constituting a portion of the port development project shall be owned, controlled or operated by the Port Authority (either directly or through a subsidiary corporation . . .), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall [they] have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the Port Authority . . .
>
> Nothing in this act shall be deemed to prevent the Port Authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through a wholly owned subsidiary . . .* * * Such subsidiary corporation shall have all of the powers vested in the Port Authority itself . . ., except that it shall not have the power to contract indebtedness.

(N.Y. Uncon. Laws § 6612) (51a-54a).

Besides these sweeping powers, and the prohibition against the interference by any other private or public entity, the Compact provides that the Port Authority commissioners may adopt by-laws for its management (Art. V of Compact: N.Y. Uncon. Laws § 6406) (46a), appoint officers and employees and determine their

qualifications and duties (Art. XIV of Compact: N.Y. Uncon. Laws § 6415) (47a) and can make rules and regulations (subject to state concurrence) (Art. XVIII of Compact: N.Y. Uncon. Laws § 6419) (48a).

Clearly, the Port Authority and PATH have been vested with enormous autonomy and sweeping powers over the 1,500 square miles under its exclusive jurisdiction. It is much more akin to a political subdivision than an arm of the compacting states. This weighs heavily against Eleventh Amendment immunity.

Two other factors relied on by this Court, in *Lake Country*, in concluding that TRPA was not entitled to Eleventh Amendment immunity, compel the conclusion that PATH is not entitled to that immunity. The TRPA was created to regulate and coordinate development in the Lake Tahoe Basin and to conserve its natural resources. The area consists of 500 square miles and that area is under the control and jurisdiction of the TRPA. *Lake Country* at 393-94. The Port Authority was created in 1921 to plan, develop and operate facilities of transportation and commerce in the "Port District," which consists of 1,500 square miles centering about New York Harbor. (A59). In *Lake Country*, this Court said that "the regulation of land is traditionally a function performed by local governments. Concern with the proper performance of that function in the bi-state area was a primary motivation for the creation of TRPA ..." This Court found that that factor supported its conclusion that TRPA was like a political subdivision, and not a state, and therefore, was not entitled to Eleventh Amendment immunity. Similarly, the Port Authority was created to regulate the land in the New York Harbor region. It too is performing a function traditionally performed by local governments and not states. It too is not entitled to Eleventh Amendment immunity.

In *Lake Country*, this Court found that TRPA was not an arm of the states subject to their control. It held that this Court's

conclusion was "*perhaps most forcefully demonstrated* by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA." *Id.* at 402 (emphasis added). The same is true in this case. In *People v. The Port of New York Authority*, 64 Misc.2d 563, 315 N.Y.S. 2d 9 (S.Ct. 1970), the State of New York resorted to litigation to seek an injunction to stop the Port Authority from polluting the water. This should forcefully demonstrate that the Port Authority is not an arm of a state and is not subject to its control. PATH is independent of any state and it is not entitled to the Eleventh Amendment immunity afforded only to states.

Thus, the non-fiscal character of PATH also supports the decision of the Second Circuit, and four Justices of this Court, that PATH is not entitled to Eleventh Amendment immunity from suit in federal court. The decisions of the Third Circuit, to the contrary, are in error. The granting of this Petition is necessary to resolve this conflict and to bring the Third Circuit's decisions in line with the decisions of this Court.

II.

THIS COURT SHOULD RE-EXAMINE ITS ELEVENTH AMENDMENT CASES SO THAT IMMUNITY FROM SUIT IN FEDERAL COURT IS NOT EXTENDED TO ENTITIES, AND IN SITUATIONS, NOT INTENDED BY THE FRAMERS OF THE AMENDMENT.

This Court has recognized that additional meaning should not be read into the "limited language of the [Eleventh] Amendment." *Lake Country* at 401. The language of the Eleventh Amendment is quite simple:

> The Judicial power of the United States shall not be construed to extend to any suit in law or

> equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Although, on its face, the Amendment only precludes federal court jurisdiction against a state when sued by citizens of *another* state, this Court has interpreted the Amendment to deny federal jurisdiction in many more situations. This overly expansive interpretation of the Amendment has been consistently challenged by vigorous dissents. *See Edelman* (Brennan, dissenting)(Eleventh Amendment should not bar citizens from suing their own state in federal court); *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, Blackmun, Stevens, Marshall, dissenting) (Eleventh Amendment is inapplicable where federal jurisdiction is based upon a federal question); *Feeney (S.Ct.)* at 309 (Brennan, Blackmun, Stevens, Marshall, dissenting) (Interstate agencies are not entitled to Eleventh Amendment immunity).

In the cases presently before this Court, PATH is a citizen of both New York and New Jersey. Mr. Hess is a citizen of New Jersey, while Mr. Walsh is a citizen of New York. Thus, these cases do not involve suits by citizens of another state. Further, PATH is an interstate compact entity. Finally, the Petitioners' claims in the District Courts were brought pursuant to their federal question jurisdiction, to wit, the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq*.

This Court should grant this Petition to determine whether these dissenting opinions, of Justices Blackmun, Stevens, Marshall and Brennan, actually reflect an accurate interpretation of the Eleventh Amendment. Because it is respectfully submitted that they do, it is also submitted that past interpretations by this Court of the Eleventh Amendment have been, without justification, too expansive. The Eleventh Amendment does not

apply to actions such as these where citizens have sued an interstate compact entity, whether or not that entity is an arm of the state, to enforce a federal right under the District Court's federal question jurisdiction. The granting of this Petition will give this Court an opportunity to re-examine the Eleventh Amendment and make certain that its interpretation is consistent with the intent of its Framers.

CONCLUSION

The Petition for Writ of Certiorari to the United States Court of Appeals to the Third Circuit should be granted.

Respectfully submitted,

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Date: January 24, 1993

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED SEPTEMBER 30, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 93-5051 and 93-5149

ALBERT HESS, Appellant in No. 93-5051

CHARLES F. WALSH, Appellant in No. 93-5149

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION (PATH)

On Appeal from the United States District Court
For the District of New Jersey

(D.C. Civil Action Nos. 90-02150 & 89-01991) District Judge: Honorable Alfred J. Lechner, Jr. District Judge: Honorable William G. Bassler

Argued September 22, 1993

BEFORE: STAPLETON, ROTH and LEWIS,
Circuit Judges

JUDGMENT ORDER

After consideration of the contentions raised by appellants it is

ORDERED AND ADJUDGED that the judgments of the district court entered December 23, 1992 and February 8, 1993, be and the same are hereby AFFIRMED.

Appendix A

Costs taxed against appellants.

By the Court,
s/ Walter K. Stapleton
Circuit Judge

ATTEST:
s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DATED: September 30, 1993

Certified as a true copy and issued in lieu
of a formal mandate on November 4, 1993.

Teste: s/ P. Douglas Sisk
Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 21, 1992

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 90-2150 (AJL)

ALBERT HESS,

Plaintiff,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION (PATH),

Defendant.

ORDER

This matter having come before the court by way of the motion of defendant Port Authority Trans-Hudson Corp. (the "Port Authority") to dismiss the complaint (the "Complaint"), filed 31 May 1990, pursuant to Fed. R. Civ. P. 12, and the court having considered the submissions of the parties, and oral argument having been held on 15 December 1992, and for the reasons set forth in a Letter-Opinion filed on this date, and for good cause shown,

IT IS, on this 21st day of December, 1992,

ORDERED, that the Port Authority motion to dismiss is granted; and it is further

Appendix B

ORDERED, that the Complaint is dismissed in its entirety.

s/ Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 21, 1992

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

21 December 1992

NOT FOR PUBLICATION

LETTER-OPINION

ORIGINAL FILED WITH THE CLERK OF THE COURT

Patrick Henigan, Esq.
Coffey & Kaye
718 Two Bald Plaza
Bala Cynwyd, Pennsylvania 19004
(Attorney for Plaintiff)

Hugh H. Welsh, Esq.
Donald F. Burke, Esq.
One Riverfront Plaza, Suite 327
Newark, New Jersey 07102
(Attorneys for Defendant)

Re: *Albert Hess v. Port Authority Trans-Hudson Corporation*
Civil Action No. 90-2150 (AJL)

Counsel:

This is a personal injury action brought by plaintiff Albert Hess ("Hess") against defendant Port Authority Trans-Hudson

(the "Port Authority"). Currently before the court is the motion of the Port Authority to dismiss the complaint (the "Complaint"), filed 31 May 1990,[1] for lack of subject matter jurisdiction.[2]

For the reasons set forth below, the motion to dismiss is granted.

Facts

Hess is a citizen and resident of the State of New Jersey. Con.plaint, ¶ 1. Port Authority is an agency of the States of New York and New Jersey, created by an Interstate Compact to which the United States Congress assented. Moving Brief at 1; *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 301 (1990). Port Authority operates various terminal, transportation and other facilities within the statutorily-defined "Port District" of New York and New Jersey, in part through its wholly-owned subsidiary PATH Interstate Railway System ("PATH"). Moving Brief at 1.

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1. In support of the motion to dismiss, the Port Authority has submitted the following: Memorandum of Law on Behalf of Defendant Port Authority Trans-Hudson Corporation in Support of Its Motion to Dismiss (the "Moving Brief"); Memorandum of Law on Behalf of Defendant Port Authority Trans-Hudson Corporation in Reply to Plaintiff's Opposition to PATH's Motion to Dismiss Returnable on December 14, 1992 (the "Reply Brief").

In opposition to the motion to dismiss, Hess has submitted the following: Plaintiff's Response to Defendant's Motion to Dismiss (the "Opp. Brief"). Oral argument was held on 15 December 1992.

2. Although the Port Authority fails to cite the rule of procedure pursuant to which the motion is brought, it appears that such a motion is appropriate under Fed. R. Civ. P. 12(h)(3).

The facts of this lawsuit are not complex. On 29 June 1987, at approximately 6:30 a.m., Hess was injured in the course of his duties while employed by the Port Authority. Complaint, ¶ 10. According to Hess, he was working in the engine of a commuter train proceeding from 33rd Street in New York City to Hoboken, New Jersey when, "the window in said train malfunctioned and struck [Hess'] right hand." *Id.* According to Hess, the accident "was caused by the negligence of [the Port Authority], its agents, servants and/or employees ... and was due in no manner whatsoever to any act or failure to act on the part of [Hess]." *Id.*, ¶¶ 5, 9-11.

Hess claims that, as a result of the accident, he has sustained "soft tissue injury to the right hand; superiostela hematoma of the right hand and injury to the tissues and muscles of the righthand."[3] *Id.*, ¶ 12. Moreover, "[s]ome or all of the above injuries are or may be permanent in nature. The full extent of [Hess'] injuries are not presently known." *Id.* Hess also claims:

> As a reşult of the accident . . . [he] has suffered a loss and impairment of earnings and earning power and will suffer the same for an indefinite time in the future; has undergone great physical pain and mental anguish and will undergo the same for an indefinite time in the future; has been obliged to and will have to continue to expend large sums of money in the future in an effort to effect a cure of his . . . injuries; and has been unable to attend his usual duties and

---

3. At oral argument, counsel for the Port Authority characterized Hess' injury as a mere "bruise." Transcript of Oral Argument (the "Oral Arg. Tr."), dated 15 December 1992, at 2-3. Counsel for Hess countered that the injury sustained was actually a "bone bruise." *Id.*

> occupation and will be unable to attend to the same for an indefinite time in the future, all to his great detriment and loss.

Id., ¶ 8.

Hess filed the Complaint on 31 May 1990, almost three years after the accident. Hess seeks damages "in excess of [f]ifty [t]housand [d]ollars pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* and the Boiler Inspection Act, 45 U.S.C. § 23. *Id.* ¶¶ 2, 12.

Discussion

The Port Authority seeks a dismissal of the Complaint on the ground that the Eleventh Amendment bars this suit because of Hess' failure to comply with the provisions on N.J.S.A. § 32:1-163. Moving Brief at 3. According to the Port Authority, this section requires suit against it to be filed within one year from the date of any alleged accident. *Id.*

The Port Authority argues that (1) it is an arm of the States of New York and New Jersey and, therefore, enjoys Eleventh Amendment immunity and (2) even though the Supreme Court has held that New York and New Jersey waived the Port Authority's Eleventh Amendment immunity when they respectively passed consent to suit statutes (the "Consent to Suit Statutes"), *see Feeney*, 495 U.S. at 308-09, that waiver was only in accordance with the statutory conditions to suit embodied in the Consent to Suit Statutes. Moving Brief at 3-7. Thus, because the Consent to Suit Statutes have a one-year limitations period, the Port Authority argues Hess' action is time-barred. *Id.* at 8.

Hess counters these arguments by contending that *Feeney*

stands for the proposition that the Port Authority has waived Eleventh Amendment Immunity entirely and that, in any event, the provisions of the Consent to Suit Statutes have no relevance to an action brought pursuant to FELA. Opp. Brief at 3-6. Hess cites *Hilton v. South Carolina Public Railways Comm'n*, ___ U.S. ___, 112 S.Ct. 560 (1991) as holding that "any sovereign immunity which may be held by state owned railroads under a state's common law has been abrogated by . . . FELA." Opp. Brief at 3. Thus, "pursuant to *Hilton*, [Hess] does not need any consent by [the Port Authority] to bring suit under . . . FELA." *Id.* Hess also argues that, even if the Consent to Suit Statutes are relevant to this case, the one year limitations period cannot supersede the three year limitations period provided by FELA. *Id.* at 6-8.

A. *Motion to Dismiss — Standard of Review*

On a motion brought pursuant to Federal Rule of Civil Procedure 12(b)(6), all allegations of the plaintiff must be taken as true and all reasonable factual inferences drawn in his or her favor. *Gomez v. Toledo*, 446 U.S. 635, 636 (1980); *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991); *Unger v. National Residents Matching Program*, 928 F.2d 1392, 1395 (3d Cir. 1991); *Markowitz v. Northeast Land Co.*, 906 F.2d 100, 103 (3d Cir. 1990); *Melikian v. Corradetti*, 791 F.2d 274, 277 (3d Cir. 1986), *petition for cert. filed* 6 June 1990.

Nevertheless, legal conclusions made in the guise of factual allegations are not given the presumption of truthfulness. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Haase v. Webster*, 807 F.2d 208, 215 (D.C.Cir. 1986); *Briscoe v. LaHue*, 663 F.2d 713, 723 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983); *Western Mining Council v. Watt*, 643 F.2d 618, 626 (9th Cir.), *cert. denied*, 454 U.S. 1031 (1981).

Accordingly, a court may dismiss a complaint for failure to state a claim when it appears beyond doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Unger*, 928 F.2d at 1395 (3d Cir); *Markowitz*, 906 F.2d at 103; *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). However, "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46; *accord Cruz v. Beto*, 405 U.S. 319, 321 (1972); *Unger*, 928 F.2d at 1395; *Angelastro v. Prudential-Bache Secur., Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985).

Additionally, the Supreme Court has stated that a federal court reviewing the sufficiency of the complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Estate of Bailey v. County of York*, 768 F.2d 503, 506 (3d Cir. 1985).

B. *Eleventh Amendment Immunity*

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI. Well established law governs application of the Eleventh Amendment. *Feeney*, 495 U.S. at 304. As the Supreme Court has recently stated:

> Since *Hans v. Louisiana*, 134 U.S. 1 (1890), we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it affirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereighty.

Blatchford v. Noatak, ___ U.S. ___, 111 S.Ct. 2578, 2581 (1991); *accord Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 472 (1987).

Stated differently, the Supreme Court "has drawn upon principles of sovereign immunity to construe the [Eleventh] Amendment to "establish that 'an unconsenting State is immune from suits brought in *federal* courts[4] by her own citizens as well as by citizens of another state.' " *Feeney*, 495 U.S. at 304 (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Employees v. Dep't of Pub. Health & Welfare*, 411 U.S. 279, 280 (1980))) (emphasis added); *accord Welch*, 483 U.S. at 472.

The Eleventh Amendment bar to suit is not absolute.

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4. The Eleventh Amendment does not apply to suits brought in state court, which are instead controlled by common law principles of sovereign immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980).

Blatchford, __U.S. at __, 111 S.Ct. at 2581; *Feeney*, 495 U.S. at 304. Two events may render the Eleventh Amendment inapplicable. First, in certain cases, Congress may abrogate a state's sovereign and/or Eleventh Amendment Immunity.[5] *Blatchford*, __U.S. at __ , 111 S.Ct. at 2581; *Feeney*, 495 U.S. at 304; *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989). Second, states may consent to suit in federal court, in which case Eleventh Amendment immunity is waived. *Feeney*, 495 U.S. at 304; *Will*, 491 U.S. at 66; *Welch*, 483 U.S. at 473; *Pennhurst*, 465 U.S. at 99.

In the first instance, the Court has adopted "a particularly strict standard" to evaluate claims that Congress has abrogated a state's sovereign and Eleventh Amendment immunity. *Gregory*, __U.S. at __, 111 S.Ct. at 2401; *Feeney*, 495 U.S at 305; *Dellmuth*, 491 U.S. at 227-28. As the Court stated in *Dellmuth*:

> To temper Congress' acknowledged power of abrogation with due concern for the Eleventh Amendment's role as an essential component of our constitutional structure, we have applied a simple but stringent test: "Congress may abrogate the State's constitutionally secured immunity from suit in federal court only by making its intention *unmistakably clear in the*

5. Although generally the Eleventh Amendment prohibits even federal question cases against states in federal courts, *see Will*, 491 U.S. at 67 n.6; *Welch*, 483 U.S. at 482, Congress may abrogate the Eleventh Amendment in certain circumstances. Specifically, Congress retains the power to override state sovereign and Eleventh Amendment immunity in cases involving (1) rights protected by the Fourteenth Amendment and (2) the regulation of interstate commerce. *See, e.g., Gregory v. Ashcroft*, __U.S. __, 111 S.Ct. 2395, 2405-06 (1991); *Welch*, 483 U.S. at __; *Pennhurst*, 465 U.S. at 99; *Quern v. Jordan*, 440 U.S. 332, 344 (1979); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 484-85 (1976).

> *language of the statute.*" . . . Evidence of congressional intent must be both *unequivocal and textual.*[6]

491 U.S. at 227-28 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, *reh'g denied*, 473 U.S. 926 (1985)) (emphasis added); *Welch*, 483 U.S. at 474; *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 16 (1981); *see also Gregory*, __ U.S. __, 111 S.Ct. at 2406 ("in the face of ambiguity, we will not attribute to Congress an intent to intrude on State government[] . . . regardless of whether Congress acted pursuant to its commerce clause power or § 5 of the Fourteenth Amendment"); *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983) ("rule of statutory construction to be applied where statutory intent is ambiguous [is that] Congress must state its intent to impose mandatory obligations on the states"); *Quern*, 440 U.S. at 342-44 ("it is not easy to infer that Congress in lesislating pursuant to the Commerce Clause . . . desired silently to deprive the States of an immunity they have long enjoyed").

The Court has similarly employed a stringent standard to determine whether a state has waived Eleventh Amendment immunity. As stated in *Feeney*: "The Court will give effect to a State's waiver of Eleventh Amendment immunity 'only where stated by the *most express language* or by such *overwhelming implication* from the text as [will] leave no room for any other reasonable construction.' " 495 U.S. at 305 (quoting *Atascadero*,

6. As a result, the Court has held that a mere permissible inference of intent is not enough to justify a finding of abrogation. *Dellmuth*, 491 U.S. at 230. Similarly, a federal statute's general authorization for suit in federal court is "not the kind of unequivocal language sufficient to abrogate the Eleventh Amendment." *Welch*, 483 U.S. at 476; *accord Dellmuth*, 491 U.S. at 231; *Atascadero*, 473 U.S. at 246.

473 U.S at 239-40) (emphasis added); *see also Welch*, 483 U.S. at 473; *Edelman v. Jordan*, 415 U.S. 651, 673, *reh'g denied*, 416 U.S. 1000 (1974). A state does not waive its Eleventh Amendment immunity by consenting to suit only in its own courts.[7] *Feeney*, 495 U.S. at 306; *Florida Dep't of Health*, 450 U.S. at 150. For a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, "it must specify the State's intention to subject itself to suit in *federal* court." *Feeney*, 495 U.S. at 306 (quoting *Atascadero*, 473 U.S. at 241) (emphasis in original).

The Court has offered numerous rationale for these strict standards of interpretation. First, "abrogation of sovereign immunity upsets the "fundamental constitutional balance between the Federal Government and the States." *Feeney*, 495 U.S. at 305; *Dellmuth*, 491 U.S at 227; *Atascadero*, 473 U.S. at 238; *Pennhurst*, 465 U.S. at 100; *Hutto v. Feeney*, 437 U.S. 678, 691 (1978), *reh'g denied*, 439 U.S. 1122 (1979). The Court explained in *Pennhurst*:

> Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A state's constitutional interest in immunity encompasses not merely *whether* it can be sued, but *where* it may be sued. As

7. In other words, "a State's waiver of sovereign immunity in its own courts is not a waiver of Eleventh Amendment Immunity in the federal courts." *Pennhurst*, 465 U.S. at 99 n.9; *see also Welch*, 483 U.S. at 473-74; *Florida Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150, *reh'g denied*, 451 U.S. 933 (1981); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

> Justice Marshall well has noted "because of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of federal judicial power has long been considered appropriate . . . ."

465 U.S. at 99-100 (quoting *Employees*, 411 U.S. at 294 (Marshall, J., concurring in result)) (emphasis in original). The Court has also recognized that a strict standard is required "because States are unable directly to remedy a judicial misinterpretation of . . . abrogation [or waiver]." *Feeney*, 495 U.S at 306.

C. *The Port Authority and Eleventh Amendment Immunity*

In a long line of cases, both Federal courts and the courts of New York and New Jersey have treated the Port Authority as a direct governmental agency of New York and New Jersey, vested with absolute immunity to suit. *See Trippe v. Port of New York Authority*, 14 N.Y.2d 119, 123 (1964); *Luciano v. Fanberg Realty Co.*, 102 A.D.2d 94, 95-96 (lst Dep't 1984) (citing cases); *Port of New York Authority v. Weehauken*, 27 N.J.Super 328, 333 (App.Div. 1953) (citing more cases), *rev'd on other grounds*, 14 N.J. 570 (1954). On two occasions, the Third Circuit has held that the Port Authority is entitled to Eleventh Amendment immunity.[8] *See Leadbeater v. Port Authority Trans-Hudson Corporation*, 873 F.2d 45, 47 (3d Cir. 1989), *vacated on other grounds sub nom., Benitez v. Port Authority Trans-Hudson Corp.*, 495 U.S. 926

8. The legislatures of both New York and New Jersey have expressly provided that PATH "shall have all of the privileges [and] immunities . . . of the Port Authority." N.J.S.A. § 32:1-35.61; N.Y. Unconsol. Laws § 6612. By virtue of these statutes, the Port Authority contends PATH enjoys Eleventh Amendment immunity

(cont'd)

(1990); *Port Authority Police Benev. Ass'n v. Port Authority of New York and New Jersey*, 819 F.2d 413, 414-18 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987). *Cf. Mineo v. Port Authority of New York and New Jersey*, 779 F.2d 939, 949 (3d Cir. 1985) (holding that Port Authority should be treated as state for Tenth Amendment Purposes), *cert. denied*, 478 U.S. 1005 (1986).

The Supreme Court has assumed, without deciding, that the Port Authority is entitled to Eleventh Amendment immunity in order to address the question of whether such immunity was waived.[9] *Feeney*, 495 U.S. at 304-05. Consistent with this authority and given Hess' failure to contest the issue, a finding that both the Port Authority and PATH are vested with Eleventh Amendment immunity is appropriate.

In almost identical statutes, however, both New York and New Jersey have expressly consented to suit against the Port Authority. *Feeney*, 495 U.S. at 306; *see* N.J.S.A. § 32:1-157; N.Y. Unconsol. Laws § 7101. The relevant provision (the "Consent Provision") reads as follows:

> . . . [T]he states of New York and New Jersey consent to suits, actions or proceedings

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(cont'd)

to the same extent as the Port Authority. Moving Brief at 4. Hess does not contend otherwise; this contention is accepted. *See Leadbeater*, 873 F.2d at 47 (employing same approach).

9. Although the Supreme Court has not addressed this issue with regard to Port Authority, it has indicated that interstate agencies can qualify for Eleventh Amendment immunity. *See Lake County Estates. Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979).

> of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port Authority . . . and to appeals therefrom and reviews thereof . . . .

N.J.S.A. § 32:1-157; N.Y. Unconsol. Laws § 7101.

In *Feeney*, the Supreme Court examined the Consent to Suit Statutes. 495 U.S. at 306-09. Although the Court recognized that the Consent Provision did not unambiguously consent to jurisdiction in Federal court, the court found consent in the statutory venue provision (the "Venue Provision") contained in a later section of the Consent to Suit Statutes. The Court recognized that the Venue Provision was "suffic[ient] to resolve any ambiguity contained in the States' general consent to suit provision by expressly indicating that the States' consent to suit in [F]ederal court." *Id.* at 306-07. The Venue Provision states:

> The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the [P]ort [A]uthority shall be laid within a county or a judicial district, established by one of the said states *or by the United States*, and situated wholly or partially within the port of New York district.

N.J.S.A. § 32:1-162 (emphasis added); N.Y. Unconsol. Laws § 7106 (same).

Significantly, although the Venue Provision was contained in a different statutory section than the Consent Provision, reference to the Venue Provision was expressly found to be appropriate. The Court stated:

> Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the [Venue P]rovision directly implicates the extent of the States' waiver embodied in the [C]onsent [P]rovision. The States' passed the [V]enue and [C]onsent to suit [P]rovisions as portions of the same Acts that set forth the nature, timing, and extent of the States' consent to suit. The [V]enue [P]rovision expressly refers to and qualifies the more general [C]onsent to suit [P]rovision.

Feeney, 495 U.S. at 307.

In addition to the Venue provision, New York and New Jersey have provided that consent to suit against the Port Authority is subject to a number of other conditions. For present purposes, the most significant condition is contained in the statutory provision which contains the limitations period for actions against the Port Authority. This provision (the "Limitations Provision") immediately follows the Venue Provision and states:

> The foregoing consent is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within *one year* after the cause of action therefor shall have accrued. . . .

N.J.S.A. 5 § 32:1-163 (emphasis added); N.Y. Unconsol. Laws § 7107 (same).

Courts applying the Consent to Suit Statutes have indicated

that the one-year limitations period is to be strictly construed. *See Larson v. Port of New York Authority*, 17 F.R.D. 298, 299-300 (S.D.N.Y. 1955); *Rao v. Port of New York Authority*, 122 F.Supp. 595, 597 (E.D.N.Y. 1954), *aff'd*, 222 F.2d 363 (2d Cir. 1955); *De Luca v. New York City Transit Authority*, 119 Misc.2d 523, 464 N.Y.S.2d 341, 341 (Sup.Ct.N.Y.County 1983); *Matthews v. Port of New York Authority*, 163 N.J.Super. 83, 85 (Law.Div. 1978), *aff'd* 171 N.J.Super 38 (App.Div. 1979); *see also Luciano*, 102 A.D.2d at 96 ("waiver of immunity statutes must be strictly construed") (citing *Schillinger v. United States*, 155 U.S. 163, 166 (1894)); *Wood v. DIC/Underhill & Universal Builders Supply Co.*, 136 N.J. Super. 249, 252 (Law.Div. 1975) (same), *aff'd*, 144 N.J.Super. 364 (App.Div. 1976), *cert. denied*, 73 N.J. 65 (1977).

In fact, as these courts have explained, the Limitations Provision "is more than a statute of limitations in the usual sense." *DeLuca*, 464 N.Y.S.2d at 341; *accord Blazano v. Port of New York Authority*, 232 N.Y.S.2d 776, 778 (Sup.Ct. Kings County 1962), *aff'd*, 23 A.D.2d 573 (2d Dep't 1965). Rather, it is "an integral part of the right to enforce [an] action" against the Port Authority, *Blazano*, 232 N.Y.S.2d at 778, and it is "a condition precedent to bringing the action which must be pleaded." *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super at 85; *Wood*, 136 N.J. Super at 252.

Because "[t]he liability and the remedy are created by and within the same statute, the limitations of the remedy [are] treated as limitations of the right." *Blazano*, 232 N.Y.S.2d at 778. For this reason, the one year limitations period is "not subject to the disabilities or excuses by which ordinary statutes of limitation may be avoided by a plaintiff." *Larson*, 17 F.R.D. at 300; *accord Blazano*, 232 N.Y.S.2d at 778 (citing numerous cases). Moreover, failure to comply with the one year limitations period results in a

jurisdictional defect requiring dismissal. *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super. at 85; *Pinckney v. Jersey City*, 140 N.J.Super. 96, 100-103 (App.Div. 1976); *see also Welch*, 483 U.S. at 476 n.6 ("Eleventh Amendment immunity 'partakes of the nature of a jurisdictional bar' ") (quoting *Edelman*, 415 U.S. at 678).

D. *Merits of Motion to Dismiss*

The Port Authority argues that this action must be dismissed because Hess has failed bring suit within one year of the date on which his action accrued. Moving Brief at 8; Reply Brief at 5. This being the case, it is argued Hess has failed to satisfy a condition precedent to bringing suit against the Port Authority; whatever waiver may be present in the Consent to Suit Statutes has, according to the Port Authority, been negated. Moving Brief at 7-8; Reply Brief at 3. This argument is persuasive.

As previously indicated, the relinquishment of Eleventh Amendment rights cannot be lightly inferred and, indeed, will not be inferred unless a court finds waiver "by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction." *Edelman*, 415 U.S. at 673; *see also supra* at pp.10-12. As a state is under no obligation to waive its Eleventh Amendment immunity, it is axiomatic that a state may agree to waive its immunity only subject to certain conditions. *See Feeney*, 495 U.S. at 307; *Pennhurst*, 465 U.S. at 99; *Luciano*, 102 A.D.2d at 96; *see also Allendale Leasing, Inc. v. Stone*, 614 F.Supp. 1440, 1451 (D.R.I. 1985) (dismissing plaintiff's claims for falling outside scope of consent to suit statute), *aff'd*, 788 F.2d 830 (1st Cir. 1986).

As one court has stated, the "presumption that immunity has

not been waived surely applies to the *scope* of a State's consent to be sued as well as to the existence of consent in the first place." *Allendale*, 614 F.Supp. at 1451 (emphasis added). Moreover, as the court in *Luciano* stated: "[Because the] Port Authority, in the absence of consent, was absolutely immune from suit, the States were free to condition consent on compliance with whatever requirements they deemed appropriate." 102 A.D.2d at 96 (citing *Trippe*, 14 N.Y.2d at 123).

In this case, the Consent to Suit Statutes offer a broad but expressly conditional waiver of the Port Authority's Eleventh Amendment immunity. *See Rao*, 122 F.Supp. at 597 (conditions to suit against Authority are clear and unambiguous). Pursuant to the Venue Provision, "consent is granted *upon the condition*" that suit against the Port Authority be maintained in the state courts of New York and New Jersey or in the Federal courts within the port district of New York. N.J.S.A. § 32:1-162 (emphasis added); N.Y. Unconsol. Law § 7106 (same). Similarly, pursuant to the Limitation Provision, "consent is granted *upon the condition*" that suit must be brought within one year of accrual of the cause of action.[10] N.J.S.A. § 32:1-163 (emphasis added); N.Y. Unconsol. Law § 7107 (same).

By its holding in *Feeney*, the Supreme Court recognized the validity of the Port Authority's conditions to consent, as well as the integrated nature of the Consent to Suit Statutes. The Court, in giving effect to the Venue Provision, stated:

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10. Other statutory conditions to suit exist. *See, e.g.*, N.J.S.A. § 32:1-160 and N.Y. Unconsol. Law § 7104 ("consent does not extend to civil suits . . . for the recovery of statutory penalties"); N.J.S.A. § 32:1-161 and N.Y. Unconsol. Law § 7105 ("consent does not extend to suits . . . for judgments, orders or decrees restraining [or] enjoining . . . the Port Authority").

> We believe that the [Venue P]rovision directly indicates the *extent* of the States' waiver embodied in the [C]onsent [P]rovision. The States passed the [V]enue and [C]onsent to suit [P]rovisions as portions of the same Acts that set forth the nature, *timing*, and extent of the States' consent to suit.

Feeney, 495 U.S. at 307 (emphasis added). Implicit in the *Feeney* Court's statement is the recognition that no reason exists to distinguish between the Venue Provision and the Limitations Provision. The two provisions are contained in consecutive statutory sections; both contain the same conditional language; and both "refer[] to and qualif[y] the more general language" and scope of the Consent Provision. *Id.*

To apply the Venue Provision but not the Limitations Provision — as Hess suggests — would create an illogical and unfair result. On the one hand, Hess would benefit from the Venue Provision by being allowed to bring suit against the Port Authority in Federal Court. On the other hand, Hess would avoid the negative effect of the Limitations Provisions if his argument is accepted that the condition does not apply. Put simply, Hess cannot be allowed to pick and choose which conditions to suit against the Port Authority should apply, subject only to the criteria of whether the condition at issue is favorable to his case. It is an all or nothing proposition and, pursuant to *Feeney*, it appears that *all* conditions apply.

Case law construing the Consent to Suit Statutes further supports this position. As discussed above, the Consent to Suit Statutes in general, and the one-year limitations period in particular, have been strictly construed. *See Larson*, 17 F.R.D. at 299-300; *Rao*, 122 F.Supp. at 597; *DeLuca*, 464 N.Y.S.2d at 341;

Matthews, 163 N.J.Super. at 85; *see also Luciano*, 102 A.D.2d at 96 (waiver of immunity statutes must be strictly construed") (citing *Schillinger*, 155 U.S. at 166); *Wood*, 136 N.J.Super. at 252. As well, these courts have recognized that the Limitations Provision "is more than a statute of limitations in the usual sense." *DeLuca*, 464 N.Y.S.2d at 341; *see also Blazano*, 232 N.Y.S.2d at 778. It is both "an integral part of the right to enforce [an] action" against the Port Authority, *Blazano*, 232 N.Y.S.2d at 778, and "a condition precedent to bringing the action" in the first place. *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super at 85; *Wood*, 136 N.J.Super at 252.

Although Hess presents numerous arguments to avoid application of the Limitations Provision and dismissal of this action, these arguments are without merit.

1. *Argument That The Port Authority Has Waived Its Eleventh Amendment Immunity In Its Entirely*

Hess argues that, pursuant to the Consent to Suit Statutes, the Port Authority has waived its Eleventh Amendment Immunity entirely. Opp. Brief at 6. According to Hess, this total waiver is necessitated by the holding in *Feeney*. Opp. Brief at 5-6. Hess concludes that "[t]he argued 'conditional waiver' of Eleventh Amendment immunity has no basis in law or in fact." *Id.* at 3.

Hess misconstrues both the holding in *Feeney* and the law generally with regard to waiver of Eleventh Amendment immunity. While *Feeney* did hold that, pursuant to the Venue Provision, the Port Authority had waived its right not to be sued in Federal Court, there was no suggestion in *Feeney* that the conditions accompanying that waiver were invalid. For instance, while *Feeney* indicated that the Port Authority can be sued in

Federal court, it neither stated nor implied that the Port Authority can be sued in *any* Federal Court.[11]

In fact, by giving positive effect to the express language of the Venue Provision, the Court, in effect, endorsed its conditions as well. This endorsement is implicit in the rationale of *Feeney*. As the discussion above indicates, *see supra* at pp.14-15, the *Feeney* Court expressly indicated that the Venue Provision was important because it "qualified the more general language" and scope of the Consent Provision. The Court also recognized that the Venue Provision was a proper place to turn for guidance because the Venue and Consent Provisions were both "portions of the same Acts that set forth the nature, *timing*, and extent of the States' consent to suit" against the Port Authority. *Feeney*, 495 U.S. at 307 (emphasis added).

In addition, even if it is conceded that *Feeney* was ambiguous with regard to the conditions expressed in the Consent to Suit Statutes, well-established case law in this area counsels against the broad reading of *Feeney* suggested by Hess.[12] As previously discussed, a stringent standard exists for finding waiver of Eleventh Amendment Immunity. In conjunction with this stringent standard, states may condition their consent. *See, e.g., Allendale*, 614 F.Supp. at 1451. As well, consent to suit statutes must be

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11. Significantly, *Feeney* was brought in a Federal judicial district which was proper under the Venue Provision. Under such circumstances, a finding of waiver was appropriate. Nevertheless, it does not follow that, if an action was instituted against the Port Authority in a Federal judicial district not covered by the Venue Provision, the Court in *Feeney* would have found a waiver under those circumstances as well.

12. The Court in *Feeney* recognized the constraining effect of this case law. *See* 495 U.S. at 304-07.

strictly construed. *Feeney*, 495 U.S. at 305-06; *Schillinger*, 155 U.S. at 166; *Luciano*, 102 A.D.2d at 96; *Wood*, 136 N.J.Super. at 252. In particular, courts have strictly construed the one year limitations period of the Consent To Suit Statutes. *See Larson*, 17 F.R.D. at 299-300; *Rao*, 122 F.Supp. at 597; *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super. at 85.

For these reasons, the broad interpretation of *Feeney* suggested by Hess is rejected. In accordance with *Feeney* and the case law in this area, the Port Authority waived its Eleventh Amendment immunity subject, *inter alia*, to the conditions set forth in the Venue Provision and the Limitations Provision.

2. *Argument That Consent To Suit Statutes Are Not Needed To Obtain Subject Matter Jurisdiction Over The Port Authority In This Case*

Hess argues that, because he is "an employee covered by FELA," he "does not need the consent of [the Port Authority] to sue." Opp. Brief at 3-4. Hess also relies on *Hilton*, ___ U.S. ___, 112 S.Ct. 560, for the proposition that he "does not need any consent by [the Port Authority] to bring suit under the FELA." *Id.* According to Hess, the Supreme Court in *Hilton* "held that any sovereign immunity which may be held by state owned railroads under a state's common law has been abrogated by the enactment by Congress of FELA. The Court held that the entire federal scheme of railroad law applies to state owned railroads." *Id.* These arguments are without merit.

As discussed, a state or state agency can lose its Eleventh Amendment immunity in only two ways — either through Congressional abrogation or through a consent to suit statute. *See supra* at pp.8-9. Hess' argument ignores the fact the Supreme

Court has already held that FELA does not, by itself, contain the necessary explicit language to constitute an abrogation of Eleventh Amendment immunity. *See Feeney*, 495 U.S. at 305; *Welch*, 483 U.S. at 476-78. In *Welch*, the Court expressly reversed that portion of *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184, *reh'g denied*, 377 U.S. 1010 (1964), which held that "Congress evidenced an intention to abrogate Eleventh Amendment immunity by making FELA applicable to 'every common carrier by railroad while engaging in commerce between any of the several states . . . .'"[13] *Welch*, 483 U.S. at 476 (quoting FELA, 45 U.S.C. § 51). The *Welch* Court further stated:

> Although our later decisions do not expressly overrule *Parden*, they leave no doubt that *Parden's* discussion of Congressional intent [in FELA] to negate the Eleventh Amendment is no longer good law. . . . Accordingly, to the extent that *Parden v. Terminal Railway, supra*, is inconsistent with the requirement that an abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language, it is overruled.

Id. at 478; *see also Hilton*, ___ U.S. at ___, 112 S.Ct. at 562-63 (reaffirming *Welch*).

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13. In *Parden*, the Court was faced with an action for damages pursuant to FELA. 377 U.S. at 184-86. In *Welch*, although the court was concerned with a different statute — the Jones Act, 46 U.S.C. § 688(a) — the Court found *Parden* to be relevant because "the Jones Act applied the remedial provisions of FELA to seamen." 483 U.S. at 471; *see also Hilton*, ___ U.S. at ___, 112 S.Ct. at 562 (confirming relation between both statutes).

Review of the relevant portions of FELA does not evidence a Congressional intent to abrogate that is "both unequivocal and textual" and "unmistakably clear in the language of the statute." *Dellmuth*, 491 U.S. at 227-28 (quoting *Atascadero*, 473 U.S. at 242); *Welch*, 483 U.S. at 475; *Pennhurst*, 4514 U.S. at 16. The relevant portions of FELA read:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering from injury while he is employed by such carrier in such commerce . . . for any such injury or death resulting . . . from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment.

45 U.S.C. § 51.

> [A]n action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

Id., § 56.

Nothing in FELA indicates an unambiguous textual intent by Congress to abrogate Eleventh Amendment immunity. The Court has repeatedly recognized that general language authorizing suit in Federal court does not satisfy the stringent standard required to show abrogation. *See, e.g., Dellmuth*, 491 U.S. at 231; *Welch*, 483 U.S. at 476; *Atascadero*, 473 U.S. at 246; *Pennhurst*, 465 U.S. at 99. The Court stated in *Atascadero*:

> A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate Eleventh Amendment. When Congress chooses to subject the states to federal jurisdiction, it must do so specifically.

473 U.S. at 246.

Hess' reliance on *Hilton* is similarly unavailing. In *Hilton*, the Court held that the language of FELA unambiguously indicated an intent by Congress to subject state owned railroads to the statute's provisions. ___ U.S. at ___, 112 S.Ct. at 563-66. Therefore, the Court concluded that states and their agencies could be sued in state court for violations of FELA. *Id.* at 566.

As the Court recognized, however, *Hilton* did not disturb the Court's Eleventh Amendment jurisprudence. The Court in *Hilton* left *Welch* intact and specifically limited its holding to suits against states maintained in *state* courts. The Court stated:

> *Welch* is not controlling here . . . . [T]he most vital consideration of our decision today, which is that to confer immunity from *state-court* suit would strip all FELA and Jones Act

> protection from workers employed by the States, was not at all discussed in the *Welch* decision . . . . . [A]s we have stated on many occasions, the Eleventh Amendment does not apply in state courts.

Id. at ___, 112 S.Ct. at 564-65 (citing *Will*, 491 U.S. at 63; *Thiboutot*, 448 U.S. at 9 n.7; *Nevada v. Hall*, 440 U.S. 410, 420-21, *reh'g denied*, 441 U.S. 917 (1979)) (emphasis added).

The *Hilton* Court further recognized that "two separate inquiries into state liability" — Eleventh Amendment doctrine and statutory interpretation — must be made by courts. *Id.* at ___, 112 S.Ct. at 566. Although in some cases this two-fold inquiry may create a situation in which a Federal statute can only be enforced in state court, the Court recognized that "[s]ymmetry is not an imperative that must override just expectations which themselves rest upon the predictability and order of *stare decisis*." *Id.* This asymmetry, in fact, is based on the established precedent that a state may waive its sovereign immunity and consent to suit in state court while, nevertheless, maintaining its Eleventh Amendment Immunity.[14] *Feeney*, 495 U.S at 306; *Florida Dep't of Health*, 450 U.S. at 150.

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14. At oral argument, counsel for Hess stated that counsel for the Port Authority appeared to be confusing state Eleventh Amendment immunity and state sovereign immunity. Oral Arg. Tr. at 6. In fact, it appears counsel for Hess has confused the two immunities. For instance, the Opposition Brief states: "As [Port Authority] enjoys no *sovereign* immunity, even in the absence of a Consent to Su[it] Provision in its legislation, the limitations or conditions contained in the Consent to Su[it] have no bearing on this action." Opp. Brief at 3 (emphasis added). This argument fails to appreciate that (1) waiver of a state's sovereign immunity does not affect a state's ability to be sued in Federal court and (2) the Consent to Suit Statutes are the only means available to Hess to achieve subject matter jurisdiction over the Port Authority.

For these reasons, neither FELA nor *Hilton* provide relief for Hess. FELA does not abrogate Eleventh Amendment immunity, nor does *Hilton* address Eleventh Amendment immunity. Because the possibility of Congressional abrogation is closed to Hess, he has no choice except to rely on the Consent to Suit Statutes for this action. Therefore, his argument that the Consent to Suit Statutes need not be employed to maintain suit against the Port Authority is rejected.

3. *Argument That The One Year Limitations Period In The Consent To Suit Statutes Cannot Be Used To Alter FELA's Three Year Limitations Period*

The final argument offered by Hess is that the one year limitations period cannot be applied in this case. Opp. Brief at 7-8. Once again, Hess argues *Hilton* controls because it held "that the entire Federal scheme of railroad law as embodied in FELA governs the remedy of injured railroaders, not state statute or common law." *Id.* at 7. The inapplicability of *Hilton* to the issues in this case has been addressed immediately above, *see supra* at pp.26-28 and need not repeated. Put simply, *Hilton* authorizes the enforcement of FELA against states and their agencies in state, not Federal, courts.

Hess also argues:

> [I]f the limitation o[f] one year has any relevance to an FELA action, the explicit terms of the FELA render the limitations void. The FELA provides that no employer may promulgate or enforce any rule or procedure which reduces or limits an employee's rights under the FELA. 45 U.S.C. § 55. The one year limitations period is argued to reduce Hess' rights under the FELA and is therefore void.

Opp. Brief at 7. These arguments are also without merit.

Contrary to Hess' characterization, this is not a case in which state and Federal statutes of limitations are found to be in conflict. In such a case, there is no question that the Federal limitations period would prevail under the principles of Federal preemption as provided by the Supremacy Clause of the United States Constitution. *See* U.S. Const. Art. VI, ¶ 2. Instead, the one year limitations period applicable in this case "is more than a statute of limitations in the usual sense." *DeLuca*, 464 N.Y.S.2d at 341; *see also Blazano*, 232 N.Y.S.2d at 778. It is "an integral part of the right to enforce [an] action" against the Port Authority, *Blazano*, 232 N.Y.S.2d at 778, and "a condition precedent to bringing the action which must be pleaded." *DeLuca*, 464 N.Y.S.2d at 341; *Matthews*, 163 N.J.Super at 85; *Wood*, 136 N.J.Super at 252.

Because "[t]he liability and the remedy are created by and within the same statute, the limitations of the remedy [are] treated as limitations of the right." *Blazano*, 232 N.Y.S.2d at 778. For this reason, the one year limitations period is "not subject to the disabilities or excuses by which ordinary statutes of limitation may be avoided by a plaintiff." *Larson*, 17 F.R.D. at 300; *accord Blazano*, 232 N.Y.S.2d at 778 (citing numerous cases).

The distinction here is between a statute promulgated by a State legislature and "a rule of [C]onstitutional law, based on the Eleventh Amendment."[15] *Hilton*, ___ U.S. at ___; 112 S.Ct. at 565.

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15. Hess' argument that Section 55 of FELA prohibits application of the one year limitations period lacks merit. A rule of Constitutional law derived from the (cont'd)

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While certainly the former would be preempted by a Federal statute, the latter cannot necessarily be so preempted. As the Court has recognized, a "state is not divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.' " *Parden*, 377 U.S. at 186 (quoting *Hans*, 134 U.S. at 10).

As previously discussed, only a state's consent or Congressional abrogation can deprive a state of its Eleventh Amendment immunity. As also discussed, FELA does not meet the stringent standard established by the Supreme Court and does not abrogate state Eleventh Amendment immunity.[16] *See supra* at pp.24-26. For these reasons, Hess can only sue the Port Authority in Federal court under the conditions to consent provided by the Consent to Suit Statutes. As a condition to suit, the Statutes required Hess to bring suit within one year. Because he failed to comply with this condition, the Complaint must be dismissed.

(cont'd)
Eleventh Amendment is simply not "a rule or procedure" promulgated by an employer to reduce or limit an employee's right under FELA.

16. The Port Authority concedes that, if this action was brought in a New York or New Jersey state court, *Hilton* would require the three year statute of limitations to be applied. Oral Arg. Tr. at 3. This is logical because *Hilton* found state sovereign immunity — and, therefore, the conditions set forth in the Consent to Suit Statutes as they apply to state courts — to be abrogated by FELA.

Hess argues that this distinction creates an "absurd" situation. *Id.* at 5-6. In a FELA suit against the Port Authority, there would be a one year limitations period if it was brought in Federal court and a three year limitations period if it was brought in New York or New Jersey state court. *Id.* While this may be the case, the Court in *Hilton* recognized that Eleventh Amendment immunity and *stare decisis* take precedence over symmetry in the law. __ U.S. at __; 112 S.Ct. at 566.

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Conclusion

For the reasons stated above, the Port Authority motion to dismiss is granted. An order accompanies this opinion.

s/Alfred J. Lechner, Jr.
ALFRED J. LECHNER, JR., U.S.D.J.

AJL:ljl
cc: Philip Selecky, Deputy Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 4, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1991(WGB)

CHARLES F. WALSH,

Plaintiff,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant.

ORDER

This matter having come before the Court on a motion by the defendant, the Port Authority Trans-Hudson Corporation, to dismiss the complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1); and

For the reasons set forth in the Court's opinion filed this day; and

For good cause shown;

It is on this 4th day of February, 1993 ORDERED that the defendant's motion hereby GRANTED; and

It is further ORDERED that the complaint is dismissed.

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 4, 1993

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 89-1991(WGB)

CHARLES F. WALSH,

Plaintiff,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Defendant.

APPEARANCES:

Coffey & Kaye
By: Patrick T. Henigan, Esq.
718 Two Bala Plaza
Bala Cynwyd, Pa. 19004
Attorney for the Plaintiff

Donald Burke, Esq.
Hugh H. Welsh, Esq.
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Newark, N.J. 07102
Attorneys for the Defendant

Appendix E

OPINION

BASSLER, DISTRICT JUDGE:

The defendant, the Port Authority Trans-Hudson Corporation, ["PATH"] moves to dismiss the complaint for lack of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). For the following reasons, the Court grants the motion and dismisses the complaint.

I. BACKGROUND

The plaintiff, Charles F. Walsh, filed suit in this Court on May 9, 1989 under the Federal Employers Liability Act, ["FELA"] 45 U.S.C. § 51 et seq. Walsh alleges that the negligence of PATH and its agents on Oct. 6, 1986 resulted in a passenger train door slamming into his right wrist and arm, seriously injuring him. Walsh worked for PATH at the time.

The Port Authority of New York and New Jersey ["the Port Authority"] is an agency of the states of New York and New Jersey, created by a bistate compact which was ratified by Congress. 42 Stat. 174 (1921). The defendant, PATH, is a regional rail commuter system operated as a wholly-owned subsidiary of the Port Authority. PATH is subject to suit to the same extent as the Port Authority. *See* N.J. Stat. Ann. § 32:1-35.61 (West 1990); N.Y. Unconsol. Law § 6612 (McKinney 1979).

II. DISCUSSION

This motion turns on whether Walsh's complaint, which was filed more than two years after the alleged negligent conduct, is barred by the one-year limitation provision in the Port Authority's consent-to-suit statutes and the Eleventh Amendment to the United States Constitution. Walsh argues that the three-year limitation period under FELA applies.

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The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citzens or Subjects of any Foreign State.

The United States Supreme Court, drawing upon principles of sovereign immunity, has construed the amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.' " *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984)(quoting *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 280 (1973)).

The Eleventh Amendment may bar a suit even though a state is not named as a party to the action, provided the state is the real party in interest. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Third Circuit has held that the Port Authority is considered a state agency entitled to Eleventh Amendment immunity. *Port Authority Police Benevolent Assoc. v. Port Authority of New York and New Jersey*, 819 F.2d 413, 415 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987); *but see Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628, 630 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990) (holding that the Port Authority is *not* a state agency for Eleventh Amendment purposes).

This circuit has also held that PATH, the Port Authority's wholly owned subsidiary, is also a state agency. *Leadbeater v. Port Authority Trans-Hudson Corp.*, 873 F.2d 45, (3d Cir. 1989), *vacated on other grounds*, 495 U.S. 926 (1990). Therefore, PATH

is entitled to immunity under the Eleventh Amendment, unless one of the two narrow exceptions to the coverage of the amendment applies.

Under the first exception, a state may waive its immunity and consent to be sued in federal court. *See Clark v. Barnard*, 108 U.S. 436, 447 (1883). Second, Congress may abrogate this immunity, without the states' consent, when it acts under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation" the substantive provisions of that amendment. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). The United States Supreme Court has also indicated that Congress' authority to abrogate the states' immunity extends, to a limited extent, beyond Section 5 of the Fourteenth Amendment. *See County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 252 (1985).

Walsh argues that both exceptions apply here. He asserts that the states of New York and New Jersey have completely waived their sovereign immunity concerning PATH. Furthermore, he asserts that Congress, in enacting FELA, abrogated the Eleventh Amendment immunity for state agencies sued under that remedial statute.

The Court concludes that PATH has only partially, and not completely, waived its sovereign immunity under the Eleventh Amendment. The legislatures of New York and New Jersey have imposed statutory conditions to suit. *See* N.J.S.A. 32:1-163; N.Y. Unconsol. Law § 7107 (McKinney 1979). Both states have imposed a one-year limitation period in which to sue the Port Authority or its subsidiaries. *Id.*

Walsh cites *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990) for the proposition that PATH has waived *all*

Eleventh Amendment immunity to suit. The Court finds that the decision does not sweep that broadly. In *Feeney*, the United States Supreme Court found that the venue provision in the Port Authority consent-to-sue statutes of New York and New Jersey, by mentioning "judicial district[s]," demonstrated the states' consent to suit in federal court. *Id.* at 307.

The Supreme Court, however, noted that New York and New Jersey did not give unlimited consent to suit:

> Although one might not look first to a venue provision to find evidence of waiver of sovereign immunity, we believe that the provision directly indicates the extent of the States' waiver embodied in the consent provision. The States passed the venue and consent to suit provisions as portions of the same Acts that set forth the nature, timing and extent of the States' consent to suit.

Id. Contrary to what Walsh's argument implies, a state need not make waiver of Eleventh Amendment immunity an all-or-nothing proposition. It may impose conditions on such a waiver. *See Pennhurst State School and Hosp. v. Halderman*, 465 U.S. 89, 99 (1984)(state's interest in Eleventh Amendment immunity extends not only to whether it may be sued, but where it may be sued). New York and New Jersey have imposed such conditions here. Walsh's Congressional abrogation argument also lacks merit. The United States Supreme Court, in *Welch v. Texas Dept. of Highways & Public Transp.*, 483 U.S. 468, 476-78 (1987), expressly held that FELA and its maritime counterpart, the Jones Act, 46 U.S.C. § 688, did not abrogate the states' Eleventh Amendment immunity.

In support of his position that, by enacting FELA, Congress

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has abrogated PATH's sovereign immunity. Walsh relies on *Hilton v. South Carolina Public Ry. Comm.*, 112 S. Ct. 560 (1991), which held that FELA created a cause of action against a state-owned railroad in state court.

But the teaching of *Hilton* is inapposite here, since that case was on appeal from the South Carolina Supreme Court and, therefore, did not involve the Eleventh Amendment, which applies only to suits in federal court.

In fashioning a rule of constitutional law based on the Eleventh Amendment, the United States Supreme Court in *Welsh* stated that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court *only* by making its intention unmistakably clear in the language of the statute." 483 U.S. at 471 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) (emphasis added). And in *Hilton*, the Supreme Court acknowledged that it had decided in *Welch* that FELA's language, for Eleventh Amendment purposes, does not amount to a clear statement of Congress' intent to abrogate state sovereign immunity. 112 S. Ct. at 565, 567.

In short, PATH is entitled to protection under the Eleventh Amendment and has consented to suit only within the statutorily imposed period of one year. Having failed to file suit within a year of the allegedly negligent conduct, Walsh has failed to meet that condition. Therefore, the Eleventh Amendment bars his claim.

III. CONCLUSION

For the reasons discussed above, the Court grants PATH's motion and dismisses the complaint for lack of subject matter jurisdiction under Rule 12(b)(1). An appropriate order follows.

Appendix E

Dated: February 4, 1993

s/ William G. Bassler
WILLIAM G. BASSLER, U.S.D.J.

APPENDIX F — SUR PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 27, 1993

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 93-5051;and 93-5149

ALBERT HESS, Appellant in No. 93-5051

CHARLES F. WALSH, Appellant in No. 93-5149

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION (PATH)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Appendix F

By the Court,
s/ Judge Stapleton
Circuit Judge

Dated : October 27, 1993

APPENDIX G — RELEVANT STATUTES INVOLVED

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.)

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45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless comenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, § 6, 35 Stat. 66; Apr. 5, 1910, c. 143, § 1, 36 Stat. 291; Mar. 3, 1911, c. 231, § 291, 36 Stat. 1167; Aug. 11, 1939, c. 685, § 2, 53 Stat. 1404; June 25, 1948, c. 646, § 18, 62 Stat. 989.)

§ 6404. Port Authority of New York and New Jersey created

ARTICLE III

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided. On and after July first, nineteen hundred seventy-two, the port authority shall be known and designated as "The Port Authority of New York and New Jersey."

L.1921, c. 154, § 1 (pt.); amended L.1972, c. 531, § 1.

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§ 6406. Board of commissioners; by-laws

ARTICLE V

The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

L.1921, c. 154, § 1 (pt.).

§ 6407. Powers of port authority; comprehensive plan for development of port

ARTICLE VI

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof:[1] and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. No property now or hereafter vested in or held by either state, or by any county, city, borough, village, township or other municipality, shall be taken by the port authority, without the authority or consent of such state, county, city, borough, village, township or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such state, county, city, borough, village, township or other municipality, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specific purpose.

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The powers granted in this article[2] shall not be exercised by the port authority until the legislatures of both states shall have approved of a comprehensive plan for the development of the port as hereinafter provided.

L.1921, c. 154, § 1 (pt.).

§ 6408. Additional powers; reports; pledging of credit

ARTICLE VII

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

L.1921, c. 154, § 1 (pt.).

§ 6415. Chairman; officers and employees

ARTICLE XIV

The port authority shall elect from its number a chairman, vice-chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

L.1921, c. 154, § 1 (pt.).

§ 6416. Appropriations for expenses

ARTICLE XV

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

L.1921, c. 154, § 1 (pt.).

§ 6419. Rules and regulations

ARTICLE XVIII

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

L.1921, c. 154, § 1 (pt.).

§ 6459. Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

The port of New York authority [FN1MV] is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all federal agencies, including the interstate commerce commission, the war department, and the United States shipping board, for suitable assistance in carrying out said plan. It shall cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said comprehensive plan. It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan. All municipalities within the district are hereby authorized and empowered to cooperate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to cooperate. The bonds or other securities issued by the port authority shall at all times be free from taxation by either state. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly

granted by statute, or the consent by any such municipality is given.

§ 6466. Actions to enforce laws and orders; jurisdiction of courts

Whenever the port authority shall be of the opinion that any person, association or corporation subject to its jurisdiction is failing or omitting, or about to fail or omit to do anything required of it by the laws governing the development and regulation of the port of New York, or by its order, or is doing or is about to do anything, or permitting, or about to permit anything to be done contrary to, or in violation of, such law or orders, it shall direct its legal representative to commence an action or proceeding in the name of the port authority, in an appropriate court having jurisdiction, for the purpose of having such violations, or threatened violations, stopped and prevented either by mandamus or injunction. Such an action or proceeding may be brought in the supreme court of this state, and the said court shall have and is hereby given the necessary and appropriate jurisdiction to grant mandamus or injunction, as the case may require, or any other relief appropriate to the case.

Failure of such person, association or corporation to notify the port authority, as required in the preceding section, of its acceptance of and willingness to obey any order of the port authority shall be and be deemed to be prima facie proof that such person, association or corporation is guilty of such violation, or threatened violation. The legal representative of the port authority shall begin such action or proceeding by a petition to the appropriate court, alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. If the petition is directed to a court of this state, it shall thereupon be

the duty of the court to specify the time, not exceeding twenty days after the service of a copy of the petition, within which the person, association or corporation complained of must answer the petition. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances, in such manner as the court shall direct, without other or formal pleadings and without respect to any technical requirement. Such other persons, associations or corporations as the court shall deem necessary or proper to join as parties, in order to make its order, judgment or writs effective, may be joined as parties upon application of the legal representative of the port authority. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that a writ of mandamus, or an injunction, or both, issue as prayed for in the petition, or in such modified or other form as the court may determine will afford the appropriate relief.

§ 6612. General powers; local laws; subsidiary corporation

All details of the effectuation, including but not limited to details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service, of the world trade center, the Hudson tubes and the Hudson tubes extensions by the port authority shall be within its sole discretion and its decision in connection with any and all matters concerning the world trade center, the Hudson tubes and the Hudson tubes extensions shall be controlling and conclusive. The local laws, resolutions, ordinances, rules and regulations of the city of New York shall apply to such world trade center if so provided in any agreement between the port authority and the city and to the extent provided in any such agreement.

So long as any facility constituting a portion of the port

development project shall be owned, controlled or operated by the port authority (either directly or through a subsidiary corporation incorporated for any of the purposes of this act [FN1MV]), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall any such agency, commission or municipality have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the port authority (or such subsidiary corporation) including but not limited to the transfer of all or any portion thereof to or by the port authority (or such subsidiary corporation).

Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not

have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but not limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act [FN2MV] and chapter three hundred one of the laws of New York of nineteen hundred fifty [FN3MV] and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one [FN4MV] as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

Whenever any state, municipality, commission, agency, officer, department, board or division is authorized and empowered for any of the purposes of this act to co-operate and enter into agreements with the port authority or to grant any consent to the port authority or to grant, convey, lease or otherwise transfer any property to the port authority or to execute any document, such state, municipality, commission, agency, officer, department, board or division shall have the same authorization and power for any of such purposes to co- operate and enter into

agreements with such subsidiary corporation and to grant consents to such subsidiary corporation and to grant, convey, lease or otherwise transfer property to such subsidiary corporation and to execute documents for such subsidiary corporation.

§ 6951. Sale of real property, manner of procedure

Whenever The Port of New York Authority [FN1MV] (hereinafter called the Port Authority) shall determine to sell any real property which may have been acquired by the Port Authority by purchase, condemnation or otherwise, pursuant to any of its powers and authorities, but which real property is no longer required for such purposes, the following procedure shall be followed:

(a) A map shall be made of such real property so determined as no longer required, which map shall be filed in the office of the Port Authority.

(b) There shall be annexed to such map a certificate executed by the chief engineer of the Port Authority stating that such real property is no longer required for such purposes.

(c) All or any portion of said real property may be sold at either private or public sale, and all deeds of conveyance therefor shall be by bargain and sale and shall be executed by the chairman, or the vice chairman, or the general manager, or an assistant general manager of the Port Authority and attested by the secretary thereof.

§ 7002. Establishment of general reserve fund

In all cases where the port authority has raised or shall

hereafter raise moneys for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the port authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds legal for investment, as herein defined and limited, issued by the port authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the port authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states.

§ 7053. Bonds as direct obligation of authority; security for payment; terms and conditions; redemption

The bonds delivered to the two states pursuant to this act [FN1MV] and the concurrent act of the state of New Jersey [FN2MV] shall be direct and general obligations of the port authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof. The payment

of the principal and interest thereof shall be secured by the general reserve fund of the port authority, authorized by chapter forty-eight of the laws of New York of nineteen hundred and thirty-one [FN3MV] and chapter five of the laws of New Jersey of nineteen hundred and thirty-one; [FN4MV] and said general reserve fund shall be pledged as security for the payment of the principal and interest of said bonds and for the fulfillment of other undertakings assumed by the port authority to or for the benefit of the holders of said bonds. Such pledge, however, shall be subject to the right of the port authority to pledge said general reserve fund as security for any other bonds, notes or evidences of indebtedness whatsoever hereafter issued by the authority as security for which it may at the time be authorized to pledge the said general reserve fund, and also subject to the right of the port authority to use the moneys in said general reserve fund to meet, pay or otherwise fulfill any of its obligations under or in connection with any bonds, notes or other evidences of indebtedness as security for which said general reserve fund has heretofore been or is now pledged or for which said general reserve fund may hereafter be pledged. Moreover, no greater rights in or to said general reserve fund shall be granted to or conferred upon the holders of the bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey than have been granted to and conferred upon the holders of general and refunding bonds of the port authority issued pursuant to the resolution of the port authority adopted March eighteenth, nineteen hundred and thirty-five, and amended March twenty-fifth, nineteen hundred and thirty-five and September sixteenth, nineteen hundred and forty-three.

The bonds delivered to the two states pursuant to this act and the concurrent act of the state of New Jersey shall be dated as of a date not more than thirty days subsequent to the date on which delivery is made or tendered, shall mature forty years from their date, and shall bear interest at the rate of one and one-half per

centum per annum. Said bonds shall be subject to redemption at the option of the port authority, in whole or in part, on any interest payment date or dates at one hundred percent of their par value, plus accrued interest to the date set for redemption.

Except as hereinbefore specifically provided, the port authority shall, by resolution, determine the form, characteristics and all other matters in connection with said bonds, including without limiting the generality hereof, the denominations in which they shall be issued, provisions with respect to the exchange of bonds of one denomination into bonds of another denomination, provisions with respect to the issuance of temporary bonds and the exchange thereof for definitive bonds, provisions with respect to the establishment of a sinking fund or sinking funds and for the use of the moneys in sinking fund to purchase or redeem bonds prior to their maturity, provisions with respect to the place of payment, provisions with respect to notice of redemption, provisions with respect to the paying agent or the registrar and provisions with respect to the method of signature.

§ 7101. Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve[1] hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority[2] (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five,[3] inclusive, hereof.

L.1950, c. 301, § 1.

Appendix G

§ 7106. Venue of action; consent to liability for tortious acts

The foregoing consent is granted upon the condition that venue in any suit, action or proceeding against the port authority shall be laid within a county or a judicial district, established by one of said states or by the United States, and situated wholly or partially within the port of New York district. The port authority shall be deemed to be a resident of each such county or judicial district for the purpose of such suits, actions or proceedings. Although the port authority is engaged in the performance of governmental functions, the said two states consent to liability on the part of the port authority in such suits, actions or proceedings for tortious acts committed by it and its agents to the same extent as though it were a private corporation.

L.1950, c. 301, § 6.

APPENDIX H — EXCERPTS OF PAGES FROM "THE PORT AUTHORITY OF NY & NJ - COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 1991"

THE PORT AUTHORITY OF NY & NJ
One World Trade Center
New York, N.Y. 10048
(212) 435-7000
(202) 961-6600

Reporting Entity and its Services

The Port Authority of New York and New Jersey is a municipal corporate instrumentality and political subdivision of the States of New York and New Jersey, created in 1921 by Compact between the two States and thereafter consented to by the Congress of the United States, which undertakes only those projects authorized by the two States. It is authorized and directed to plan, develop, and operate terminals and other facilities of transportation and commerce, and to advance projects in the general fields of transportation, economic development, and world trade that contribute to promoting and protecting the commerce and economy of the Port District, which comprises an area of about 1,500 square miles in both States centering about New York Harbor.

The Governor of each State appoints six of the twelve members of the governing Board of Commissioners, subject to confirmation by the respective State Senate. The Commissioners serve six-year overlapping terms as public officials without compensation. They establish Port Authority policy and appoint an Executive Director to implement it, and also appoint a General Counsel to act as legal advisor to the Board and to the Executive Director. Governors from either State have from time to time

exercised their statutory power to review and to veto the actions of Commissioners from their respective State.

The Executive Director is responsible for the management of the daily operations of the agency's 39 facilities through line and staff departments and guides proposals to the point of presentation to the Board of Commissioners. The Executive Director is also responsible for implementing such proposals after presentation to and approval by the Board.

As a public corporation serving the people of the New York-New Jersey metropolitan region, the Port Authority combines sound business and governmental principles and practices and is dedicated to providing high quality public service and operating efficiency. To assist in guiding the operation of each of the departments, detailed policies and procedures are published and communicated to employees.

The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction or acquisition of facilities upon the basis of its own credit. The agency has neither the power to pledge the credit of either State or any municipality nor to levy taxes or assessments.

Results of Operations

Gross operating revenues totalled $1,856,895,000 in 1991, an increase of $166,165,000 or 9.8% over 1990. This growth is primarily attributable to the effect of the 1991 toll increase, the first full year of operations of the Essex County Resource Recovery Facility, and higher flight fees due to the recovery of higher costs at all the airports. Operating expenses totalled $1,337,406,000 in 1991, an increase of $55,108,000 or 4.3% over 1990, mainly

reflecting the full year of operations of the Essex County Resource Recovery Facility, and higher bad debt expense.

Portfolio Management

The Port Authority's long-term investments are in securities of or guaranteed by the United States Government and in Port Authority bonds. Earnings of $47,165,000 on long-term investments were recorded pursuant to Port Authority bond resolutions.

Short-term investments consisted primarily of United States Government securities (including such securities held pursuant to repurchase agreements), securities of United States Government Agencies and in limited amounts of commercial paper. In addition, short-term investments were also made, in connection with certain interest rate exchange contracts, with investment firms and banking institutions and, in connection with certain interest rate options contracts, with primary dealers in United States Treasury securities. Earnings on short-term investments pursuant to Port Authority bond resolutions totalled $27,649,000, which includes approximately $6,000,000 of earnings distributed to capital.

Combined earnings on such long-term and short-term investments decreased from 1990 by approximately 4.9%, primarily due to a declining interest rate environment.

The balance of financial income credited to operations pursuant to Port Authority bond resolutions consists principally of interest on loans in connection with the Essex County Resource Recovery Facility and conditional installment sales of office units at the Newark Legal and Communications Center.

Appendix H

Risk Management

The Port Authority presently carries insurance or requires such insurance to be carried upon all of its facilities now in operation against direct physical loss or damage and loss of revenue resulting therefrom, in such amounts, with such deductibles or exceptions, with such exclusions of portions of facilities, and against such hazards, if available, as it deems appropriate. The Port Authority also carries excess public liability insurance in connection with all of its facilities against such hazards, and in such amounts, if available, as it deems appropriate. The Port Authority provides for uninsured potential losses through its self-insurance program by appropriation from the Consolidated Bond Reserve Fund to the Operating Fund and provides for losses by charging operating expenses as incurred.

Notes to Consolidated Financial Statements

Note A-Summary of Significant Accounting Policies:

1. The Port Authority of New York and New Jersey, created in 1921 by Compact between the two States and thereafter consented to by the Congress of the United States, has no stockholders or equity holders; cash derived from operations and other cash received must be disbursed for specific purposes in accordance with provisions of various statutes and agreements with holders of its obligations and others. The costs of providing facilities and services to the general public on a continuing basis are recovered primarily in the form of tolls, fares, fees, rentals and other user charges.

Appendix H

Note E - Financing:

1. The Port Authority finances construction and acquisition of its facilities primarily by issuing bonds, notes and other obligations and through application of its reserve funds. Details of outstanding obligations are described in Note D.

(2) 93-1197
No.

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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16 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is the Respondent, the Port Authority Trans-Hudson Corporation (PATH), a wholly-owned subsidiary of The Port Authority of New York and New Jersey, which is a direct agency of the States of New York and New Jersey, created by Interstate Compact, to which Congress consented, a State agency for Eleventh Amendment purposes under the criteria of *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)?

2. Is the Port Authority and by extension, its wholly-owned subsidiary, the Respondent PATH, prevented from interposing the statutory conditions to suit, pursuant to which, this Court held in *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), the Legislatures of New York and New Jersey waived any Eleventh Amendment immunity, because a judgment against PATH would not be paid out of general state tax revenue?

LIST OF PARTIES

The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney's 1979); N.J.S.A. §§32:1-1 to-24 (West 1990). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District. The Port Authority has no subsidiaries other than the Respondent, the Port Authority Trans-Hudson Corporation (PATH), a wholly-owned subsidiary, which owns and operates the PATH railroad line between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

Petitioners Albert Hess and Charles F. Walsh are employees of PATH.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT HESS,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

POINT I

A Conflict Between the Second and Third Circuits Does Exist Regarding the Status of Respondent as a State Agency for Eleventh Amendment Purposes. Petitioners Have Improperly Formulated the Question Setting Forth the Parameters of the Conflict.

A. Petitioners' Question 1 Is Improperly Formulated.

PATH cannot reasonably deny that there is a clear conflict between the Second and Third Circuits on the status of the Port Authority and of its wholly-owned subsidiary, PATH, as a state agency for Eleventh Amendment purposes. For that is the precise conflict this Court let stand in *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990), in basing its disposition on a finding that there had been a statutory waiver of PATH's Eleventh Amendment immunity, 495 U.S. at 304-05, rather than reaching the constitutional question of PATH's Eleventh Amendment status. The Second Circuit in that case below, *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), inappropriately and unnecessarily in view of that Court's finding of waiver, reached the constitutional issue to hold that PATH was not a state agency for Eleventh Amendment purposes, 873 F.2d at 630-31.[1]

---

[1] See in this regard, this Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-6 (1988):

> A fundamental and long-standing principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them . . . This principle required the courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. *If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate.* (Citations omitted) (Emphasis added)

At the same time, it also should be noted that Petitioners apparently are not now contesting the actual holdings of the district courts below, which were affirmed by the Third Circuit without comment, namely, that, under the reasoning of this Court's decision in *Feeney*, *supra*, PATH may interpose its one-year limitations provision, N.J.S.A. §32:1-163 (West 1990); N.Y. Unconsol. §7107 (McKinney's 1979), thus removing any statutory waiver, to defeat a claim brought pursuant to the Federal Employer's Liability Act (FELA), 45 U.S.C. §51 et seq. in federal court.

Furthermore, the courts of the Second Circuit obviously have not had an opportunity to pass on the specific question raised by the instant case, namely, the applicability of PATH's suability statute, in view of the Second Circuit's reaching of the constitutional issue in *Feeney*, *supra*.

Clearly then, it is not this case for which Petitioners are seeking review. Rather, it is the holding of the Third Circuit in *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. and N.J.*, (*PBA*), 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987). In *PBA*, the Third Circuit found that the Port Authority of New York and New Jersey was a state agency entitled to Eleventh Amendment immunity by evaluating the agency pursuant to all the factors laid down by this Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 444 U.S. 391 (1979), 819 F.2d at 417.

Thus, while PATH cannot reasonably deny the existence of a conflict between the two Circuits on the question of whether PATH is a state agency for Eleventh Amendment purposes, in commenting upon the instant petition, PATH takes issue with the formulation of the question Petitioners seek to have certified.

More specifically, Petitioners' Question 1 is improperly formulated in that it begs the very question to be decided

herein. Quite obviously, if it were conceded, as Petitioners would have it, that "no judgment against PATH will impact the state treasury of either of the two compacting states" and "the statutory structure of PATH indicates that it is not the arm of either of the compacting states", the result would be preordained. However, at the same time, PATH respectfully submits such a result, in effect, would create an absolute rule precluding the finding of Eleventh Amendment immunity for interstate agencies which, because of their interstate nature, generally tend to have financial and administrative structures separate from the creating states. Such an absolute rule would run afoul of this Court's decision in *Lake Country Estates*, *supra*.

Moreover, Petitioners' formulation is directly contrary to the consistent position of the Third Circuit on the status of the Port Authority and its wholly-owned subsidiary PATH, first enunciated in *PBA* and then reaffirmed in *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655, 663 (*en banc*) (3d Cir. 1989), *cert. denied*, 493 U.S. 850 (1989); *Leadbeater v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 45, 46 (3d Cir. 1989), *vacated on other grounds*, 495 U.S. 926 (1990); *Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807, 813 (*en banc*) (3d Cir. 1991). As a result, Petitioners' formulation of Question 1 misstates the parameters of the conflict between the Circuits.

Accordingly, PATH urges that should the Petition be granted to resolve the conflict, that certification be granted on the questions as formulated above in PATH's Counter-statement of Questions Presented.

B. *The Third Circuit's Analysis Provides the Correct Rule of Decision.*

Although PATH cannot reasonably deny the existence of the conflict, PATH respectfully submits that the Third

Circuit's analysis in *PBA*, an evaluation of the Port Authority on the basis of *all* of the *Lake Country Estates* criteria, 819 F.2d at 417, provides the correct rule of decision. In contrast, Petitioners, echoing the analysis of the Second Circuit in *Feeney*, *supra*, 873 F.2d at 630, erroneously focus on the "state treasury" factor as outweighing all other indicia of state agency status. Indeed, their Petition serves only to demonstrate in any number of ways that the Port Authority and PATH do not draw upon general state tax revenue.

But, this Court has never held this factor to be the *sine qua non* for immunity. Indeed, in *Lake Country Estates*, *supra*, in acknowledging this factor as one of the elements to be considered, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." 440 U.S. at 400-01 (footnote omitted). Apart from the fact that requiring that a judgment "have the same practical consequences as a judgment against the State", actually indicates that a judgment *need not* be paid from general state tax revenue, nowhere in the *Lake Country Estates* opinion is there any indication that this factor is, by itself, controlling. Indeed, in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101 n. 11 (1984), this Court held that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In point of fact, suits seeking injunctive relief against the state are as much barred by the Eleventh Amendment as are suits for money damages. See, *inter alia*, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Furthermore, there is nothing in the authorities cited by Petitioners supporting the proposition that the notion of "state treasury" is referable only to general tax revenue, or even that there can be but one "state treasury".

Indeed, in *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459 (1945), cited by Petitioners, and the case most often cited for the importance of the "state treasury" factor, this Court's focus upon the potential liability of the state treasury was for the simple purpose of determining who, in fact, was the real party in interest since individuals were the nominal defendants, and a point apparently had been raised that the presence of such individuals as named defendants created federal court jurisdiction. This Court's words are clear and admit of no other interpretation:

> And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. (Citations omitted) 323 U.S. at 464.

Similarly, in *Edelman v. Jordan*, 415 U.S. 651 (1974), *reh'g denied*, 416 U.S. 1000 (1974), also cited by Petitioners for this proposition, again the focus on the "state treasury" was for the purpose of identifying the real party in interest where state officials were the only named defendants. Petitioners cite language in *Edelman* to the effect that:

> [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. (Citations omitted) 415 U.S. at 663.

While that proposition is certainly true, it does not necessarily then follow that if a judgment is not paid from a state's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates, supra*. However, at no time does PATH concede that its treasury, dedicated to state governmental purposes, N.J.S.A. §32:1-35.59 (West 1990); N.Y. Unconsol. §6610 (McKinney's 1979), its uses legislatively constrained, N.J.S.A. §§32:1-4, 32:1-8 (West 1990); N.Y. Unconsol. §§6404, 6408 (McKinney's 1979)(App. G at 45a, 47a), and subject to gubernatorial veto, N.J.S.A. §32:1-35.57 (West 1990); N.Y. Unconsol. §6612 (McKinney's 1979) (App. G at 53a), is not a state treasury within the meaning of *Lake Country Estates, supra*.

Thus, PATH respectfully submits that the disposition of this matter by the Third Circuit below is the correct result.

POINT II

This Matter is An Inappropriate Vehicle to Revisit the Question of the Scope of Eleventh Amendment Immunity.

Petitioners ask this Court to take the opportunity to reexamine the scope of Eleventh Amendment immunity in cases arising under federal question jurisdiction. PATH respectfully submits that this case is an inappropriate vehicle for such reexamination. As PATH noted in POINT I, *supra*, the sole issue affirmed by the Third Circuit in the instant matter is whether under this Court's decision in *Feeney, supra*, PATH could interpose the one-year jurisdictional limitations provision, N.J.S.A. §32:1-163 (West 1990); N.Y. Unconsol. §7107 (McKinney's 1979), to defeat Petitioners' FELA claims in federal court, notwithstanding the FELA's three-year statute of limitations, 45 U.S.C. §56 (App G at 45a).

Accordingly, this case presents a rather unique situation where this Court has found waiver of Eleventh Amendment immunity to be expressly conditioned by the terms of a state statute, 495 U.S. at 307. Thus, the result herein does not necessarily impact any agency, bi-state or single state, other than the Port Authority and its wholly-owned subsidiary, PATH.

Moreover, Petitioners are the architects of their own fates. Petitioners cannot be heard to deny that they were informed of PATH's interpretation of this Court's *Feeney* decision in time to comply with PATH's one-year limitations provision. Certainly then, the circumstances at bar, an elapsed limitations provision, do not call into question the propriety of applying the Eleventh Amendment to defeat federal question jurisdiction.

CONCLUSION

The Petition For a Writ of Certiorari Should be Denied as to Question 2 of the Petition.

Dated: New York, New York
February 25, 1994

Respectfully submitted,

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Supreme Court, U.S.
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On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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QUESTION PRESENTED

WHETHER PORT AUTHORITY TRANS-HUDSON CORPORATION, A WHOLLY OWNED SUBSIDIARY OF A BI-STATE AGENCY CREATED BY INTERSTATE COMPACT, IS ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.

THE PARTIES

The Petitioners, who are individual railroad employees, are Albert Hess and Charles F. Walsh. The Respondent, an interstate railroad, is the Port Authority Trans-Hudson Corporation (hereinafter, PATH). PATH is a wholly owned subsidiary of The Port Authority of New York and New Jersey (hereinafter, Port Authority), an entity created by an interstate compact between the States of New York and New Jersey, with the consent of Congress, pursuant to Article I, §10, Clause 3 of the Constitution.

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals in *Albert Hess v. Port Authority Trans-Hudson Corporation*, consolidated with, *Charles F. Walsh v. Port Authority Trans-Hudson Corporation*, (App., 1a-2a)[1], consists solely of a Judgment Order summarily affirming, without comment or analysis, the opinions rendered by the United States District Court for the District of New Jersey. The Court of Appeals' decision is reported at the table in 8 F.3d 811 (3d Cir. 1993). The District Court opinion in *Hess* (App. C, 5a-33a) is reported at 809 F.Supp. 1172 (D.N.J. 1992). The District Court opinion in *Walsh* (App. E, 35a-41a) is reported at 813 F.Supp. 1095 (D.N.J. 1993).

JURISDICTION

The judgment of the Court of Appeals, in the consolidated cases, was entered on September 30, 1993. (App. A, 1a-2a) A petition for rehearing and rehearing en banc was denied on October 27, 1993. (App. F, 42a-43a) The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was filed on January 24, 1994 and was granted on March 21, 1994. *See* 114 S.Ct. 1292. This Court has jurisdiction under 28 U.S.C. §1254(1).

[1] All references in this Brief to "App." refer to the appendix contained in the Petition for a Writ of Certiorari. The Court has dispensed with the requirement that a Joint Appendix be filed by Order of May 2, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Article I, §10, Clause 3, of the United States Constitution provides:

> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

The Federal Employers' Liability Act, provides for the jurisdiction of federal district courts at 45 U.S.C. §56, which reads:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."
>
> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Additionally, portions of the Compact and subsequently enacted bi-state legislation are found at N.Y. Uncon. L. §§6101 *et seq.* and N.J.S.A. §§32:1-1 *et seq.* The New York statutes are identical with the New Jersey statutes. Only the New York statutes are reproduced at App. G, 45a-58a.

STATEMENT OF THE CASE

I. Underlying FELA Claims.

The Petitioners, Albert Hess and Charles F. Walsh, were employees of PATH at the time of their respective accidents. Mr. Hess was a locomotive engineer. On June 29, 1987, he sustained injuries when the train's window malfunctioned and struck his right hand. Mr. Walsh was a railroad conductor. On October 6, 1986, he was injured when a passenger train door malfunctioned and slammed into his right wrist and arm. Each employee sustained personal injuries because of the malfunctioning railroad equipment.

Each employee believed that their respective injuries were caused by the negligence of PATH. Therefore, they filed actions pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§51 *et seq.* The Hess Complaint was filed on May 31, 1990. The Walsh Complaint was filed on May 9, 1989. Both Complaints were filed within the three-year statute of limitations established by 45 U.S.C. §56, but more than one year after the respective accidents.

II. The Port Authority And PATH.

The Third Circuit held that the Respondent, PATH, a wholly owned subsidiary of the Port Authority of New York and New Jersey, is entitled to Eleventh Amendment immunity. The Third Circuit's ruling is entirely dependent on its view that PATH is the equivalent of the compacting states. Petitioners submit that this is incorrect, and therefore undertake a detailed discussion of the Port Authority and PATH and the instruments by which the entities were created and operate.

The Port Authority was created in 1921 to plan, develop, and operate facilities of transportation and commerce in the "Port District," which consists of 1,500 square miles centering about New York Harbor, and to regulate the land in the New York Harbor region. (App. 59a) PATH, a wholly owned subsidiary of the Port Authority, is an interstate railroad operating trains between the States of New York and New Jersey. The Port Authority, and thus PATH, are entities created by an interstate compact between the States of New York and New Jersey, consented to by Congress. August 23, 1921, Chapter 77, 42 Stat. 174; July 1, 1922, Chapter 277, 42 Stat. 822. PATH is entitled to "all of the privileges, immunities, tax exemptions and other immunities of the port authority" and is "subject to suit . . . as if [it] were the port authority itself." NY Uncon. Laws §6612 (App. 51a-54a) Accordingly, the discussion and analysis of whether PATH is entitled to Eleventh Amendment immunity from suit in federal court will primarily be based on an analysis of its parent, the Port Authority. *See Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 300-301

(1990) (cited as *Feeney*); August 23, 1921, Chapter 77, 42 Stat. 174; July 1, 1922, Chapter 277, 42 Stat. 822; N.Y. Uncon. Laws §6612 (App. 51a-54a).

The Port Authority/PATH has described itself, in its 1991 Comprehensive Annual Report, as a "political subdivision" and a "municipal corporate instrumentality" of New York and New Jersey (App. 59a).[2] PATH's self-characterization is consistent with the Compact that created it and designated it as a "body corporate and politic" (Article III of Compact: N.Y. Uncon. Laws §6404) (App. 45a), constituting a "body, both corporate and politic . . . " (Art. VI of Compact: N.Y. Uncon. Laws §6407) (App. 46a-47a). PATH also refers to itself as a "public corporation" (App. 60a) and is referred to by statute as a "municipal corporate instrumentality of the two states." N.Y. Uncon. Laws §6459 (App. 49a)

PATH is financially self-sustaining. As the Port Authority has explained,

> "The Compact envisions the Port Authority as being financially self-sustaining . . . " (App. 60a)

Its extensive revenue is a result of "tolls, fares, fees, rentals and other user charges." (App. 62a) Further,

> "The Port Authority finances construction and acquisitions of the facilities primarily by issuing bonds, notes and other obligations and through application of its reserve fund." (App. 63a)

---

[2] The Port Authority's 1992 Comprehensive Report contains statements that are identical, or essentially identical, to those contained in the 1991 Report. For the sake of convenience and clarity, references to the similar language in the 1992 Report will not be repeated at each reference to the 1991 Report.

Additionally, the Port Authority obtains funding through its portfolio investments. Indicative of its financially self-sustaining nature, the Port Authority reported, in its 1991 Report, $47,000,000.00 of earnings on long-term investments and $27,649,000.00 of earnings on short-term investments. (App. 61a)

Not only does PATH raise its own funds, but the Compact and statutes have insulated both the States of New York and New Jersey from any liability arising from the Port Authority, and PATH's, operations. Again, quoting the Port Authority,

> "The agency has neither the power to pledge the credit of either State or any municipality . . . " (App. 60a)

Article VII of the Bi-State Compact (N.Y. Uncon. Laws §6408) (App. 47a) clearly commands:

> "The Port Authority *shall not* pledge the credit of either state except by and with the authority of the legislature thereof." (emphasis added).

See also, United States Trust Company of New York v. State of New Jersey, 431 U.S. 1, 4-5 (1977) ("The Port Authority was conceived as a financially independent entity, with funds primarily derived from private investors."); N.Y. Uncon. Laws §6459 (App. 49a-50a) (" . . . it shall have no power to pledge the credit of either state or to impose any obligation upon either state or municipality . . . "); 7053 (App. 55a-57a) ("bonds . . . shall be direct and general obligations of the Port Authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof").

The Port Authority, and PATH, are completely autonomous from the States of New York and New Jersey. The Port Authority, by statute, has a separate corporate existence. The Port Authority/PATH, indicative of its autonomous nature, can sue and be sued (N.Y. Uncon. Laws §§7101, 6612, 6466) (App. 57a, 51a-54a, 50a-51a). *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 663 (3d Cir. 1989) (en banc), *cert. denied*, 493 U.S. 850 (1989). The Port Authority/PATH can enter into contracts (N.Y. Uncon. Laws §6612) (App. 51a-54a) ("all details of the effectuation, including . . . contracts . . . , shall be within its sole discretion . . . "); and can purchase, sell or lease land, or own and hold real or personal property (Art. VI of Compact: N.Y. Uncon. Laws §6407, N.Y. Uncon. Laws §6951) (App. 46a-47a, 54a).

PATH has significant authority to make its own rules and regulations, and to enforce them. Relevant portions of its enabling act are as follows:

> "The Port Authority . . . is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either state, to effectuate the [comprehensive plan], except the power to levy taxes or assessments." (N.Y. Uncon. Laws §6459) (App. 49a-50a)

Another provision of its effectuating statute provides:

> "All details of the effectuation . . . shall be within its sole discretion and its decision . . . shall be controlling and conclusive."

> " . . . no agency, commission or municipality of either or both of the two states shall have . . . any jurisdiction over the terms or method of effectuation of all or any portion thereof by the Port Authority . . . "
>
> (N.Y. Uncon. Laws §6612 – App. 51a-54a)

Besides these sweeping powers, and the prohibition against the interference by any other private or public entity, the Compact also provides that the Port Authority commissioners may adopt by-laws for its management (Art. V of Compact: N.Y. Uncon. Laws §6406) (App. 46a), appoint officers and employees and determine their qualifications and duties (Art. XIV of Compact: N.Y. Uncon. Laws §6415) (App. 47a) and can make rules and regulations (subject to state concurrence) (Art. XVIII of Compact: N.Y. Uncon. Laws §6419) (App. 48a).

III. The Decisions Below And Related Authority.

PATH filed Motions to Dismiss in the District Court, claiming that the Eleventh Amendment immunized it from suit in federal court. The Motions asserted non-compliance with an alleged condition precedent to its waiver to suit in federal court, N.Y. Uncon. Laws §7107 (N.J.S.A. §32:1-163), that provides:

> "The foregoing consent to suit is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefore shall have accrued . . . "

Therefore, although the Complaints were filed within the three-year statute of limitations established by the FELA,

PATH asserted that its waiver required that suit in federal court be filed within one year after an accident.

The District Court in *Hess* assumed that PATH was an entity entitled to assert Eleventh Amendment immunity. It relied on the Third Circuit's opinion in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey* (hereinafter cited as *PBA*), 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), and other opinions, to find that PATH was entitled to Eleventh Amendment immunity. (App. 15a-16a) The District Court in *Walsh* also relied on *PBA* in holding that PATH was entitled to assert Eleventh Amendment immunity. (App. 37a) Each District Court also held that N.Y. Uncon. Laws §7107 (N.J.S.A. §32:1-163) placed a restriction upon PATH's waiver of Eleventh Amendment protection, found by this Court in *Feeney*, 495 U.S. 299, and that the waiver was only effective if suit was brought within one year of the accident. Because, in each case, suit was brought more than one year after the accident, each case was dismissed. (App. B, 3a-4a and App. D, 34a)

The Third Circuit affirmed, without comment or analysis, both District Court dismissals, and denied Petitioners' petition for rehearing or rehearing en banc. (App. F, 42a-43a)

The three-year statute of limitations has run in each case. The Petitioners have no remedy unless this Court reverses the Third Circuit and holds that PATH is not entitled to Eleventh Amendment immunity from suit in federal court.

SUMMARY OF ARGUMENT

The Port Authority/PATH is not entitled to the immunity from suit in federal court afforded by the Eleventh Amendment to the Constitution, because it is not a state and any judgment against it will not be paid from the treasury of any state. Instead, the Port Authority/PATH is structured as an autonomous entity similar to a political subdivision or municipal corporation.

This Court has repeatedly held that Eleventh Amendment immunity from suit in federal court can only be claimed by a state, or certain agencies exercising the power of the state. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court established the test for determining whether an interstate compact entity is entitled to Eleventh Amendment immunity from suit in federal court. Under *Lake Country* there is a presumption against Eleventh Amendment immunity and only a state – not a county, political subdivision or municipality – is entitled to assert the Eleventh Amendment's protection. Moreover, even though some state entities can assert the Amendment's protection, they can only do so where it is necessary "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Id.* at 401.

Thus, the determinative question here is whether the compact creates an entity comparable to a state. An entity created by interstate compact cannot be afforded Eleventh Amendment protection unless there is "good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States

themselves, and that Congress concurred in that purpose. . . . " *Lake Country*, 440 U.S. at 401.

The language of the interstate compact is significant in determining whether the interstate entity is akin to a political subdivision or a state. The interstate compact between New York and New Jersey calls the Port Authority/PATH, a "body corporate and politic." This Court has recognized that this term refers to a local government or municipal corporation and not a state. Decisions of the state courts of New York and New Jersey, during the period that the Compact was proposed, also demonstrate that the compacting states recognized that term to apply to local governments and municipal entities and not states. A review of the Eleventh Amendment and its history also leads to the conclusion that "bodies corporate and politic" were not intended to be afforded Eleventh Amendment protection. A review of the legislative history of Congress' consent to the Compact also reveals the understanding by Congress that the entity was not to be afforded protection from suit in federal courts. Consistent with these numerous sources is the Port Authority/PATH's own statement, contained in its legally mandated Comprehensive Report, that it is a political subdivision.

A review of the autonomous nature of the entity, including its purpose in the regulation of land, separate corporate existence, ability to sue and be sued, ability to contract, and sweeping other powers and authorities, also support the conclusions reached from the Compact that the Port Authority/PATH is structured as an autonomous entity akin to a municipal subdivision and not the agency

of either compacting state. Further support for the conclusion that the entity is not entitled to Eleventh Amendment protection is that it is not subject to the control of either compacting state. For instance, the State of New York has resorted to suit against PATH to compel it to stop polluting the Jamaica Bay. The entity's history shows an agency that has been adverse and antagonistic to the goals of its compacting states.

Because of the historical purpose of the Eleventh Amendment – protecting state treasuries – the fiscal structure of the interstate entity, and whether a judgment against the entity can be collected from the compacting states' treasuries, must also be carefully analyzed to determine whether the interstate entity is akin to a political subdivision or a state. That analysis leads to the conclusion that the Port Authority/PATH is also not entitled to Eleventh Amendment protection from suit in federal court because it is financially self-sufficient. Further, any judgment against it cannot become the liability of either compacting state. The Compact creating the Port Authority, and subsequent legislation, fully insulated both New York and New Jersey from any judgment rendered against the interstate entity. Accordingly, a judgment against the Port Authority/PATH is not the same as a judgment against a state.

Thus, the Port Authority's Compact, its own self-description, its structure, its actual relationship with the compacting states, and its fiscal structure demonstrate that it is a financially self-sustaining and autonomous entity that neither Congress nor the states intended to cloak with Eleventh Amendment immunity.

ARGUMENT

I. PATH IS NOT ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT BECAUSE IT IS NEITHER A STATE NOR AN ARM OF THE STATE.

A. The Presumption Against Eleventh Amendment Immunity Contained In *Lake Country* Is Consistent With The Constitutional Plan Under Which States, Creating An Interstate Compact Entity, Surrender Their Sovereignty As It Relates To That Entity And Its Functions.

This Court has repeatedly held that Eleventh Amendment immunity from suit in federal court can only be claimed by a state, or certain agencies exercising the power of the state. In *Lake Country*, concerning an interstate compact entity created by the States of California and Nevada (the Tahoe Regional Planning Agency), this Court established the test for determining whether an interstate compact entity is entitled to Eleventh Amendment immunity from suit in federal court. The test establishes a presumption against Eleventh Amendment immunity. The Court held,

> "By its terms, the protection afforded by the Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and

municipalities, even though such entities exercise a 'slice of state power.' "

"If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment." 440 U.S. at 401.

See also Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

The *Lake Country* presumption against Eleventh Amendment immunity for interstate compact entities is consistent with the constitutional plan under which those entities exist. Sovereign immunity is reserved for sovereign entities. Although the states were fully sovereign before entering the Union, when the states joined the Union they surrendered some of their sovereignty as part of the "plan of the convention." *Pennsylvania v. Union Gas Company*, 491 U.S. 1, 19-20 (1989); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 323-324 (1934); *Hans v. State of Louisiana*, 134 U.S. 1, 13 (1890).

One area in which the states relinquished their sovereignty was their ability to make compacts and agreements with other sovereigns. Before joining the Union their ability to do so was an inherent right of the state as

a sovereign. Upon joining the Union, that right was limited by the Constitution. Article I, §10, Clause 3, provides:

"No State shall, *without the Consent of Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State, or with a foreign Power*, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (emphasis added)

As members of the Union, previously sovereign states now have to seek the consent of Congress before entering agreements with other states. The role of Congress is not superficial. As this Court explained in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 282, n. 7 (1959),

"Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The Framers thus astutely created a mechanism of legal control over the affairs that are projected beyond State lines . . . They allowed interstate adjustments but duly safeguarded the national interest."

See also, State ex. rel Dyer v. Sims, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. That it is a means of safeguarding the national interest is well illustrated in the compact now under review [Ohio River Valley Water Sanitation Compact]."); *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 483-485 (1978) (White, J., dissenting).

Not only do compacting states relinquish their sovereignty to the federal government, but they also surrender

their sovereignty to each other. Once a state joins with another state in creating a separate entity to perform certain functions, it is limited by the actions of the other state.

An example will make this clear. In 1927 the New Jersey legislature enacted legislation to direct the Port Authority to prepare for passenger service operations. Previously, it had limited its service to freight trains. Had New Jersey retained its sovereignty that policy would have been effectuated. Because the Port Authority was an interstate compact entity, the implementation of New Jersey's political and public goals required the consent of New York. New York did not pass similar legislation. This "ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years." *United States Trust*, 431 U.S. at 6. New Jersey had relinquished a portion of its sovereignty, as it related to the port district, to New York. When New York did not agree with New Jersey, New Jersey could not act. *Id.*

This example is not unique. It has been written that "perhaps the greatest fear and criticism of interstate compacts and interstate compact agencies is that they result in some diminution of state sovereignty and ability to act independently in certain circumstances." James M. Jackson, *Enhancing State Regulation Through The Compact Clause*, 9 Journal of Insurance Regulation 151, 162 (Dec. 1990).

Because the states relinquish their sovereignty (to both Congress and other states) when they enter into interstate compacts, they cannot vest interstate compact

agencies with sovereignty. Also, because they have relinquished their sovereignty, neither the states nor the entity, can assert sovereign immunity to escape the jurisdiction of the federal courts. The test set forth in *Lake Country* recognizes the diminution in the sovereignty of the compacting states because of our constitutional structure.

B. The Language Of The Compact Creating The Port Authority/PATH Manifests The States', And Congress', Intention That It Not Be Considered A State Entity And That It Not Be Entitled To Eleventh Amendment Immunity.

The Port Authority/PATH is more akin to a county or a political subdivision, than a state. As such, it is not entitled to Eleventh Amendment protection from suit in federal court. *Lake Country*, 440 U.S. at 401. Petitioners submit that any discussion of the Port Authority/PATH's waiver, in the courts below, was irrelevant. The Port Authority/PATH is not, and never has been, a state nor a state entity entitled to assert Eleventh Amendment immunity. It is not a sovereign and is not entitled to any form of sovereign immunity. Thus, it cannot waive what it is not entitled to have.

PATH is described in the Compact between the States of New York and New Jersey, that was approved by Congress, as a "body corporate and politic." (Article III of Compact: N.Y. Uncon. Laws §6404) (App. 45a) The Compact further provides that the entity shall constitute a "body, both corporate and politic. . . . " (Art. VI of Compact: N.Y. Uncon. Laws §6407) (App. 46a-47a) It is

also referred to by statute as a "municipal corporate instrumentality of the two states." N.Y. Uncon. Laws §6459 (App. 49a)

This Court has previously considered the term "body corporate and politic." The conclusion drawn from those opinions is that this term designates an entity that is similar to a political subdivision or public corporation, and not a state. In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), this Court discussed the designation of "bodies politic and corporate." The issue in *Will* was whether the word "person" in the Civil Rights Act, 42 U.S.C. §1983, referred to states and state officials. The Court held that §1983 did not include states. Its analysis refers to the term "bodies corporate and politic" as used in the Dictionary Act. The Court concluded that the traditional use of the term "body corporate and politic" was to refer to "corporations, both private and public (municipal), and not to include the States." *Id.* at 69-70.[3]

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[3] *See also, Will*, 491 U.S. at 69, n. 9, *citing*, 1 B. Abbott, *Dictionary of Terms and Phrases Used in American Jurisprudence* 155 (1879) (defining bodies politic and corporate as the "most exact term for 'public corporation' "); W. Anderson, *A Dictionary of Law* 127 (1893) (bodies politic and corporate defined as the "most exact expression for a public corporation or corporation having powers of government"); *Black's Law Dictionary* 143 (1891) ("body politic" is a "term applied to a corporation, which is usually designated as a 'body corporate and politic' " and "is particularly appropriate to a public corporation invested with powers and duties of government"); 1 A. Burrill, *A Law Dictionary and Glossary* 212 (2d ed. 1871) ("body politic" is a "term applied to a corporation, which is usually designated as a body corporate and politic").

In *United States v. Fox*, 94 U.S. 315 (1876) this Court also found that the term "bodies politic" did not refer to a sovereign. The issue in this case was whether the devise of real property to the United States, under New York intestate laws, was permissible. The Court held that the devise was void. This Court ruled that the word "person" in the New York statute concerning the transfer of land did not include transfer to a sovereign, but only to a person or corporation. The Court explained that "person" included "bodies politic," and that bodies politic were entities "deriving their existence and powers from legislation." *Id.* at 321. Because sovereigns (such as the United States or one of the states) do not derive their power from legislation, a sovereign was not included as a person to whom property could be transferred. Thus, the term "bodies politic" did not describe a sovereign. The Port Authority/PATH is not a sovereign, and is therefore not entitled to sovereign immunity, because its existence and power derives from legislation, that is, the Compact.

Will also is instructive in defining the term "municipal corporate instrumentality." This is one of the descriptions of PATH contained in its enabling legislation. N.Y. Uncon. Laws §6459 (App. 49a). In *Will*, the Court stated:

> "A public corporation, in ordinary usage, was another term for a municipal corporation, and included towns, cities, and counties, but not States."

491 U.S. at 69, n. 9.

The use of the term "body corporate and politic" was later changed in the Dictionary Act and replaced with "partnerships and corporations." In making this revision

it was said that body corporate and politic "is precisely equivalent to 'corporations'," and therefore was "redundant . . . " *Ngiraingas v. Sanchez*, 495 U.S. 182, 191 (1990), *citing from*, 1 *Revision of the United States Statutes as Drafted* 19 (1872). Thus, the term used in PATH's Compact and enabling legislation has traditionally not referred to states, but to municipal entities that are not entitled to Eleventh Amendment protection.

In addition to a review of decisions of this Court, and sources relied upon by it, a review of New York and New Jersey state cases also confirm that the term "bodies corporate and politic" refers to municipal entities and not states. Several cases in New York and New Jersey state courts, handed down during the period that the interstate compact was enacted, suggest that the term "bodies corporate and politic" was neither used nor understood to refer to states. The term was used when referring to local government bodies and municipal or private corporations. Thus, the logical conclusion is that the Compact also used the term to refer to a municipal entity and not a state or state agency.[4]

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[4] *See Langdon v. Mayor of City of New York*, 133 N.Y. 628, 634-636, 31 N.E. 98 (N.Y. 1892) (body politic used to refer to a municipal body [New York City] and not the state); *In re Piers Old Nos. 8, 9, 10 and 11, North River, in City of New York*, 228 N.Y. 140, 126 N.E. 809 (N.Y. 1920) (similar to and citing *Langdon*); *People Wallaston Realty Co. v. Craig*, 229 N.Y. 23, 27, 127 N.E. 591 (N.Y. 1920) (bodies politic or corporate referring to those from whom property can be taken by eminent domain); *In re East 149th Street in City of New York*, 188 N.Y.S. 579 (N.Y.A.D. 1 Dept. 1921), *aff'd., In re: City of New York*, 232 N.Y. 511, 134 N.E. 550 (N.Y. 1921); *People ex. rel. Bronx Parkway Commission v. Common Council of City of Yonkers*, 229 N.Y. 1, 127 N.E. 595 (N.Y. 1920)

A historical review of the Eleventh Amendment also supports the conclusion that the term "bodies corporate and politic" does not include states. It is generally accepted that the Eleventh Amendment was a reaction to the decision of *Chisholm v. State of Georgia*, 2 U.S. (2 Dall.) 419 (1793). That decision was handed down on February 18, 1793. On February 19, 1793, a resolution was introduced in the House of Representatives stating:

> "[N]o State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, *or of any body politic or corporate* whether within or without the United States."

1 C. Warren, *The Supreme Court in United States History* 101 (rev. ed. 1937), *citing, Pennsylvania Journal* (February 20, 1793) (emphasis added). The text of the resolution, that would develop into the Eleventh Amendment, clearly expresses that "bodies politic and corporate" were not the equivalent of any state, but were separate entities

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(local government body created to establish a public park, was referred to as a body politic); *Attorney General v. Borough of Ocean Grove, in Manmouth County*, 96 N.J.L. 158, 114 A. 15 (N.J. Ct. Err. & App. 1921) (body politic used to refer to a borough); *People ex. rel. Shipston v. Thompson*, 187 N.Y.S. 395 (N.Y. Sup. 1921) (the term "body politic" was used to refer to a municipal entity that was vested with many of the same legal rights as the Port Authority/PATH); *Frawley v. Tenafly Trans. Co.*, 95 N.J.L. 405, 113 A. 242 (N.J. Ct. Err. & App. 1921) (refers to a private corporation as a "body politic"); *Archibald v. Maurath*, 92 N.J. Eq. 357, 113 A. 6 (N.J. Ch. 1921) (refers to body politic or corporate as an entity being subject to state taxation).

that the states were afraid would bring suit against them. These "bodies corporate and politic" were not to be protected by the Eleventh Amendment. On the contrary, the Amendment was to protect states from them and other potential adverse litigants. Thus, PATH, as a "body corporate and politic," is an entity against which the states are protected, but not an entity that is entitled to claim the protection of the Eleventh Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 283-284 (1985) (Brennan, J., dissenting).

The designation of PATH as a "body corporate and politic" and a "municipal corporate instrumentality" is contrary to its claim that it is entitled to the Eleventh Amendment protection reserved for states. Those terms define it as a political subdivision or municipal entity that is not entitled to Eleventh Amendment protection. *See Lake Country*, 440 U.S. at 401.

C. The Language Of The Congressional Provisos Included In The Statutes Consenting To The Compact, Manifests Congress' Intention That The Port Authority/PATH Not Be Considered A State Entity And That It Not Be Entitled To Eleventh Amendment Immunity.

The conclusion that the Port Authority/PATH is not entitled to Eleventh Amendment protection is bolstered by the terms of Congress' acceptance of the Compact in 1921, 42 Stat. 174, and the amendment of the following year, 42 Stat. 822. When the original Compact was presented for Congress' approval, pursuant to Article I, § 10, Clause 3 of the Constitution, concerns were expressed regarding appropriate reservations for protecting federal

rights and interests in the areas that the new Port Authority would be governing. In a letter of June 30, 1921, Secretary of War John W. Weeks wrote to the House Committee considering the Joint Resolution adopting the Compact, and he noted that,

> "it is not improbable that actions at law will arise through which the consent of Congress as granted by the resolution will be subjected to court review, the suggestion is therefore raised whether the phraseology of the resolution may not be changed to better effect its intended purpose."

Development and Administration of the Port of New York, H.R. Rep. No. 279, 67th Cong., 1st Sess. 5 (July 21, 1921) (letter of June 30, 1921, from Secretary Weeks to Rep. Goodykoontz).[5] Secretary Weeks suggested the reserving language which subsequently appeared as the first section of the 1921 Joint Resolution: "*Provided*, That nothing- . . . contained [in the Compact] shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement." 42 Stat. 174, 180.

Apprehension about reservations of federal "rights" and "jurisdiction," particularly in the context of federal court proceedings involving the New York Port Authority, were revisited by Congress the following year when

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[5] *See also Establishment of the Port of New York Authority*, S. Rep. No. 161, 67th Cong., 1st Sess. (June 21, 1921) (noting that Secretary of the Treasury Andrew Mellon was likewise concerned that language be added "that nothing in the compact shall be construed as waiving or surrendering any right now vested in the Federal Government.").

New York and New Jersey asked for Congressional consent to a comprehensive plan for developing the port. The above language was repeated in the 1922 Joint Resolution, but as one of three clauses.[6] On the House floor, concern was expressed about these reservations and the powers being given to the New York Port Authority. Congressman Montague of Virginia said:

> "[I]f the Port of New York Authority has any authority to effectuate this agreement, it must derive that authority from the agreement itself, to which this Congress must consent. So that the language in question [the newly-added proviso] is either surplusage or in violation of the jurisdiction of Congress. I do not think Congress should undertake by language, however impotent, to give any *corporate body* an authority which must be found in an agreement to which Congress alone can consent and can not authorize."

62 Cong. Rec. (part 8), 67th Cong., 2d. Sess. 7976 (June 1, 1922) (remarks by Rep. Montague) (emphasis added).

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[6] In the first paragraph of the 1922 Joint Resolution, consent to the Comprehensive Plan was "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over matters, or any part thereof, covered by this resolution." 42 Stat. 822.

As if this was not enough, Congress added yet another proviso at the conclusion of the Resolution: "[n]o bridges, tunnels, or other structures shall be built across, under or in any of the waters of the United States, and no change shall be made to the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War." 42 Stat. 822, 826.

This statement is significant not only in reflecting at least one Congressman's understanding of the legal status of the New York Port Authority, but also in expressing concern about federal court jurisdiction over the entity. Representative Montague was troubled that the two new provisos concerning federal navigations rights and servitudes would be read by courts as a narrow exemption. *See id.* (remarks by Rep. Montague) ("I do not know but that the Government would be protected in any event – not by the provisos, because I think the courts would interpret this so-called authorization as either a nullity or a consent.") Nonetheless, Montague's colleague, Mr. Fairchild, offered a helpful point:

> Mr. FAIRCHILD. If the gentleman will yield further, the first proviso [the one concerning "rights" and "jurisdiction"] is broader than bridges, *and is as broad as any possible right the United States Government can have.*
>
> Mr. MONTAGUE. The gentleman is entirely right. If the agreement to which we are asked to consent does not confer the authorization upon the Port of New York Authority, Congress cannot confer it by the language to which I object.

Id. at 7977 (emphasis added).

Petitioners acknowledge that while these statements do not definitively disclaim a Congressional intent to cloak the Port Authority with Eleventh Amendment immunity, they are highly suggestive that Congress surely did not mean such a result. The proviso reserving all federal "rights" and "jurisdiction" (contained in both the 1921 and 1922 Joint Resolution) should be construed broadly, just as Representatives Montague and Fairchild

discussed. These provisos can be fairly read to answer the concerns of legislators and administration officials that the Port Authority would not be amenable to suit in federal court. Petitioners submit, therefore, that the plain meaning of the Compact (and the later comprehensive plan), as well as the Congressional Joint Resolutions, reveal that there was no intent to grant the Port Authority Eleventh Amendment immunity.

D. The Port Authority/PATH Characterizes Itself As A Political Subdivision And As Such Is Not Entitled To The Protection Of The Eleventh Amendment From Suit In Federal Court.

PATH has stated that it is a political subdivision. Thus, it is not entitled to the protection from suit in federal court afforded by the Eleventh Amendment. *Lake Country*, 440 U.S. at 401; *Mt. Healthy*, 429 U.S. at 280. In its Comprehensive Annual Report PATH unequivocally states,

> "The Port Authority of New York and New Jersey is a municipal corporate instrumentality and *political subdivision* of the States of New York and New Jersey, created in 1921 by compact between the two States and thereafter consented to by the Congress of the United States." (emphasis added) (App. 59a)

The obligation of PATH to issue an annual report is mandated by its enabling Compact. (Art. VII of Compact: N.Y. Uncon. Laws §6408) (App. 47a)

It is curious that PATH calls itself a political subdivision in its mandated report, but has argued just the opposite in an attempt to cloak itself with Eleventh Amendment immunity from suit in federal court. The Port Authority/PATH's self-characterization is consistent with the characterization contained in its Compact and enabling legislation. This Court should ignore this ruse and accept PATH's own description that it is a political subdivision.

E. The Port Authority/PATH Has A Purpose, Separate Legal Identity And Powers That Make It Similar To A Political Subdivision Rather Than An Agency Of A State.

The Port Authority/PATH, like the TRPA that was the agency involved in *Lake Country*, was created to regulate and coordinate the development of land. In *Lake Country*, this Court said that "the regulation of land is traditionally a function performed by local governments." 440 U.S. at 402. This Court found that that factor supported its conclusion that TRPA was like a political subdivision, and not a state, and therefore, was not entitled to Eleventh Amendment immunity. The Port Authority was created in 1921 to plan, develop and operate facilities of transportation and commerce in the "Port District," which consists of 1,500 square miles centering about New York Harbor. (App. 59a) The Port Authority was created to regulate the land in the New York Harbor region. PATH, its subsidiary, operates an interstate railroad that services this region. The Port Authority/PATH is also performing a function traditionally performed by local governments and not states. It too, therefore, is not entitled to Eleventh Amendment immunity.

PATH, like the entity reviewed in *Lake Country*, is an entity autonomous from the States of New York and New Jersey. It has significant independent powers. The Port Authority/PATH is essentially a government unto itself. It is, therefore, not entitled to Eleventh Amendment immunity. *Lake Country*, 440 U.S. at 400-401.

The Port Authority, by statute, has a separate corporate existence. The Port Authority/PATH, indicative of its autonomous nature, can sue and be sued (N.Y. Uncon. Laws §§7101, 6612, 6466) (App. 57a, 51a-54a, 50a-51a). *Fitchik*, 873 F.2d at 663. The Port Authority/PATH can enter into contracts (N.Y. Uncon. Laws §6612) (App. 51a-54a) ("all details of the effectuation, including . . . contracts . . . , shall be within its sole discretion. . ."); and can purchase, sell or lease land, or own and hold real or personal property (Art. VI of Compact: N.Y. Uncon. Laws §6407, 6951) (App. 46a-47a, 54a).

As was the entity in *Lake Country*, PATH has significant authority to make its own rules and regulations, and to enforce them. Relevant portions of its enabling act are as follows:

> "The Port Authority . . . is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either state, to effectuate the [comprehensive plan], except the power to levy taxes or assessments." (N.Y. Uncon. Laws §6459) (App. 49a-50a)

Another provision of its effectuating statute provides:

> "All details of the effectuation, including but not limited to details of financing, leasing,

> rentals, tolls, fares, fees and other charges, rates, contracts and services . . . shall be within its sole discretion and its decision . . . shall be controlling and conclusive."
>
> "So long as any facility constituting a portion of the port development project shall be owned, controlled or operated by the Port Authority (either directly or through a subsidiary corporation . . .), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall [they] have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the Port Authority . . . "
>
> "Nothing in this act shall be deemed to prevent the Port Authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through a wholly owned subsidiary . . . *** Such subsidiary corporation shall have all of the powers vested in the Port Authority itself . . . , except that it shall not have the power to contract indebtedness."
>
> (N.Y. Uncon. Laws §6612 - App. 51a-54a)

Besides these sweeping powers, and the prohibition against the interference by any other private or public entity, the Compact provides that the Port Authority commissioners may adopt by-laws for its management (Art. V of Compact: N.Y. Uncon. Laws §6406) (App. 46a), appoint officers and employees and determine their qualifications and duties (Art. XIV of Compact: N.Y. Uncon. Laws §6415) (App. 47a) and can make rules and regulations

(subject to state concurrence) (Art. XVIII of Compact: N.Y. Uncon. Laws §6419) (App. 48a).

The Port Authority and PATH have been vested with enormous autonomy and sweeping powers over the 1,500 square miles under its exclusive jurisdiction. It is much more akin to a political subdivision than an arm of the compacting states. Therefore, the Port Authority/PATH is not entitled to the protection from suit in federal court afforded by the Eleventh Amendment.

F. PATH Is Adverse To, And Not Subject To The Control Of, Its Compacting States, And This Relationship Between PATH And The States Of New York And New Jersey Demonstrates That It Is Not The Equivalent Of Either State And Is Not Entitled To Eleventh Amendment Protection.

In *Lake Country*, 440 U.S. at 402, this Court said that the TRPA was not an arm of the states subject to their control. This factor weighed heavily against Eleventh Amendment protection, noting that its conclusion was "perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA." *Id.* at 402. The same is true with PATH. In *People v. The Port of New York Authority*, 64 Misc.2d 563, 315 N.Y.S. 2d 9 (N.Y. Sup. 1970), the State of New York resorted to litigation and sued the Port Authority to seek an injunction to stop it from polluting the water in Jamaica Bay. This "forcefully demonstrate[s]" that the Port Authority is not an arm of a state and is not subject to its control.

An additional example shows the lack of control by the states over the Port Authority (and thus PATH). In 1958, the State of New Jersey wanted the Port Authority to operate interstate passenger rail trains between New York and New Jersey, a function now performed by PATH. The New Jersey legislature introduced a bill that would have had the Port Authority "take over, improve, and operate" these trains. Had the Port Authority been subject to the control of its compacting states, it would have cooperated with the legislative goals of New Jersey. Instead,

> "[t]he bill was vigorously opposed by the Port Authority on legal and financial grounds. The Port Authority also *retaliated*, in a sense, by including a new safeguard in its contracts with bondholders. This prohibited the issuance of any bonds, secured by the general reserve fund, for a new facility unless the Port Authority first certified that the issuance would not 'materially impair the sound credit standing' of the Port Authority." *United States Trust*, 431 U.S. at 8 (emphasis added).

Because of the Port Authority's opposition and retaliatory actions, the bill was not passed and the goals of a compacting state were thwarted. *Id.* This behavior was inconsistent with an agency of the compacting states, that was subject to their control.

In his study, *Interstate Compacts in the Political Process* (University of North Carolina Press - Chapel Hill 1967), Weldon V. Barton discusses the Port Authority. Indicative of an independent entity not subject to the control of either compacting state, Mr. Barton writes,

> "Attempts to impose controls on the Authority from the outside (either to force the agency to engage specific problems or to prevent actions by the Authority that would have been detrimental to specific interests) have been sporadic and unco-ordinated and *have involved bargaining and give-and-take between the compact agency and potentially-controlling groups, agencies, and officials.*" *Id.* at 69 (emphasis added).

He also writes,

> "[I]nvolvement of the interstate authorities with mass transit and other urban problems is highly dependent upon bargaining between governors, mayors, and other officials . . . and the compact administrators . . . " *Id.* at 87.

If the Port Authority/PATH were an arm of either the State of New York or New Jersey, the governors of the states would not have to resort to bargaining to have it comply with their goals and the goals of the states. Their need to do so is demonstrative of the Port Authority/PATH's independence. As an independent entity, it is much more akin to a political subdivision or municipality than it is to a state or a state agency.

II. PATH IS NOT ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT BECAUSE A JUDGMENT AGAINST PATH IS NOT THE SAME AS A JUDGMENT AGAINST EITHER OF ITS COMPACTING STATES. THE PORT AUTHORITY/PATH IS FINANCIALLY SELF-SUSTAINING AND THE STATES OF NEW YORK AND NEW JERSEY ARE FULLY INSULATED AGAINST ANY JUDGMENT RENDERED AGAINST PATH.

A. Eleventh Amendment Sovereign Immunity Is Only Extended To State Associated Entities Where It Is Necessary To Protect The Treasury Of A State.

This Court recognized, in *Lake Country*, that the purpose of extending the Eleventh Amendment immunity to a state associated entity is "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself," *Lake Country*, 440 U.S. at 401; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, n. 34 (1984) *(citing Lake Country); see also Ford Motor Company v. Dept. of Treasury of State of Indiana*, 323 U.S. 459 (1945); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

This rule is consistent with the original purpose of the Eleventh Amendment. In *Petty*, 359 U.S. 275, n. 1, this Court explained that when the Eleventh Amendment was first proposed,

> "More than the dignity of the state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts.

> The states could therefore use the new amendment not only in defense of theoretical sovereignty, but also in a more practical way to forestall suits by individual creditors!"

See also, Pennhurst, 465 U.S. at 151 (1984) (Stevens, dissenting) ("There is general agreement that the Amendment was passed because States were fearful that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin.")

B. The Port Authority/PATH Is Not Entitled To Eleventh Amendment Protection Because Any Judgment Against It Will Not, And Cannot, Be Paid From The Treasuries Of Either Compacting State.

When the fiscal character of the Port Authority of New York and New Jersey (and its fully owned subsidiary, PATH) is analyzed, it becomes evident that PATH is not an agency of either New York or New Jersey. It is, instead, a financially self-sustaining entity that is responsible for its own debts. Any debt that it incurs, and any judgment against it, will not be paid from the treasury of either New York or New Jersey. Therefore, it is not entitled to the sovereign immunity afforded by the Eleventh Amendment.

PATH's money does not predominantly come from the states. This Court recognized in *United States Trust*, 431 U.S. at 4, that the Port Authority/PATH "was conceived as a financially independent entity with funds

primarily derived from private investors." This is confirmed by the Port Authority that has stated,

> "The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction and acquisition of facilities upon the basis of its own credit." (App. 60a)

The Port Authority Comprehensive Financial Report (App. H, 59a-63a) reports an increase in gross operating revenues and states that this is "primarily attributable to the effort of" toll increases and higher flight fees. (App. 60a-61a)[7] At another portion, the Port Authority reports,

> "The costs of providing facilities and services to the general public on a continuous basis are recovered primarily in the form of tolls, fares, fees, rentals and other user charges." (App. 62a)

The Report also documents,

> "The Port Authority finances construction and acquisitions of the facilities primarily by issuing bonds, notes and other obligations and through application of its reserve fund." (App. 63a)

Additionally, the Port Authority obtains funding through its portfolio investments. Indicative of its self-sustaining financial posture, the Port Authority reported $47,000,000.00 of earnings on long-term investments and $27,649,000.00 of earnings on short-term investments.

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[7] The 1992 Report states that "Gross operating revenues totalled $1,933,512,000 in 1992, an increase of $76,617,000 or 4.1% over 1991. This growth is primarily attributable to . . . the 1991 toll increase and increased airport revenues from higher flight fees, rental agreements, and overseas passenger volume."

(App. 61a) *See also* N.Y. Uncon. Laws §§6459 (App. 49a) (reference to authority of the Port Authority to issue bonds and securities); 7053 (App. 55a-57a) (authorizing the Port Authority to issue bonds as the general obligations of the Port Authority); 7002 (App. 54a-55a) (establishing a general reserve fund to place surplus revenues to be used to pledge as security or to be used for its undertakings).

The Port Authority is, as the Compact envisions, "financially self-sustaining." (App. 60a) Its money does not come from the States of New York or New Jersey, and, therefore, it is not entitled to any Eleventh Amendment immunity.

Equally, if not more important than the fact that the Port Authority's money does not come from any state, is the nature of the states' obligation to PATH. The States of New York and New Jersey do not appropriate money to the Port Authority. Further, and of vital import, a judgment against Port Authority/PATH *will not* impact on the treasury of either state. Article VII of the Bi-State Compact (N.Y. Uncon. Laws §6408) (App. 47a) clearly commands:

> "The Port Authority *shall not* pledge the credit of either state except by and with the authority of the legislature thereof." (emphasis added)

The Comprehensive Financial Report states,

> "The agency neither has the power to pledge the credit of either state or any municipality . . . " (App. 60a)

See also N.Y. Uncon. Laws §6459 (App. 49a-50a) (" . . . it shall have no power to pledge the credit of either

state or to impose any obligation upon either state or municipality . . . "); 7053 (App. 55a-57a) ("bonds . . . shall be direct and general obligations of the Port Authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof").

Although Compact Article XV provides a mechanism for state appropriations to the Port Authority/PATH, those appropriations are not mandatory. Further, even the voluntary appropriations that can be made under that Article are limited to "salaries, office and other administrative expenses." It provides:

> "Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislature of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority *and approved by the governors of the two states*, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year." (emphasis added) (N.Y. Uncon. Laws §6416) (App. 48a)

Any appropriation by either New York or New Jersey, in response to a judgment against Port Authority/PATH, is solely discretionary. No appropriation can be made to the Port Authority/PATH, by either compacting state, unless the appropriation is recommended and approved by the governors of the two states. That voluntary appropriation does not trigger Eleventh Amendment immunity. *Fitchik*, 873 F.2d at 661. As in *Lake Country*, a

judgment against the Port Authority/PATH is not enforceable against any state.

The District Courts below, relying on *PBA*, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), incorrectly determined that the Port Authority/PATH was entitled to Eleventh Amendment protection because the judges in *PBA* had inaccurately read and misquoted Article XV.[8] In *Feeney*, four members of this Court recognized that *PBA* was in error and, agreeing with the Second Circuit, found that the Port Authority/PATH was not entitled to Eleventh Amendment immunity from suit in federal court. 495 U.S. at 316-318 (Justices Brennan, Marshall, Blackmun and Stevens, concurring).

Further evidence that a judgment against PATH is not a judgment against either of the compacting states is the existence of insurance. In a section titled, "Risk Management," the Port Authority reports that it carries both ordinary insurance and excess public liability insurance. Further, it "provides for uninsured potential losses through its self-insurance program by appropriation from the Consolidated Bond Reserve Fund to the Operating Fund and by charging operating expenses as incurred." (App. 62a)

Accordingly, extending Eleventh Amendment protection to PATH is not necessary to protect the treasuries of either New York or New Jersey, its compacting states.

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[8] The Third Circuit cited Compact Article XV as follows: "Unless . . . the revenues from operations are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amounts needed]." *PBA* at 416.

CONCLUSION

It is respectfully requested that the decisions of the United States Court of Appeals for the Third Circuit in *Hess* and *Walsh* be reversed and remanded for further proceedings.

Respectfully submitted,

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No. 93-1197

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT HESS,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

vs.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

WHETHER PORT AUTHORITY TRANS-HUDSON CORPORATION, A WHOLLY OWNED SUBSIDIARY OF A BI-STATE AGENCY CREATED BY INTERSTATE COMPACT, IS ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.

LIST OF PARTIES

The Port Authority is a bi-State agency created in 1921 by a Congressionally-consented-to Compact to develop interstate public transportation, terminal, and other facilities of commerce within the statutorily defined Port District. 42 U.S. Stat. 174 (1921), consenting to 1921 N.J. Laws, Ch. 151 and 1921 N.Y. Laws, Ch. 154. The Compact is codified at N.Y. Unconsol. Laws §§6401-23 (McKinney 1979); N.J.S.A. §§32:1-1 to-24 (West 1990). Pursuant to the Compact, and subsequently enacted bi-State legislation supplemental thereto, the Port Authority owns and operates thirty-seven public facilities in the Port District. The Port Authority has no subsidiaries other than the Respondent, the Port Authority Trans-Hudson Corporation (PATH), a wholly-owned subsidiary, which owns and operates the PATH, an interurban electric rapid transit system between New York and New Jersey, and the Newark Legal and Communications Center Urban Renewal Corporation, which owns and operates an office building in Newark, New Jersey.

Petitioners Albert Hess and Charles F. Walsh are employees of PATH.

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BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Portions of the Compact and subsequently enacted bi-State legislation, N.Y. Unconsol. L. §§6401 *et seq.* (McKinney 1979); N.J.S.A. 32:1-1 *et seq.* (West 1990), specifically relied upon herein, are reproduced in an Appendix to this Brief (RA-1-RA-25).

SUMMARY OF ARGUMENT

This Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), articulated criteria for determining whether an interstate agency, such as the Port Authority and by extension, its wholly-owned subsidiary, Respondent PATH, is a State agency for Eleventh Amendment purposes or a political subdivision in the nature of a county or a municipality which, for apparently historical reasons, is not entitled to claim such immunity.

Applying and weighing all the *Lake Country Estates* factors, no one of which by itself is pre-eminent or controlling, PATH submits that the Port Authority is entitled to State agency status for Eleventh Amendment purposes inasmuch as the Legislatures of both States have declared many times that, in effectuating their statutory directives and authorizations, the Port Authority performs governmental functions, and both the federal and state courts have, without exception, held that it is a direct agency of the Compacting States themselves, engaged, on their behalf, in fulfilling functions of State, not as Petitioners would have it, local government.

Moreover, although state tax or other general state revenues strictly speaking would remain untouched by

judgments against the Port Authority, this factor does not make the agency, which presently is a *source*, rather than a recipient, of revenues for the Compacting States, any less a State agency. Indeed, the New York and New Jersey Legislatures have reserved to themselves the power to direct the flow of Port Authority monies.

PATH submits that an overemphasis on the so-called "state treasury" factor, misapplies the test of *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459 (1945). In *Ford*, this Court's focus on the state treasury was for the purpose of determining who was the real party in interest since state officials were named defendants.

Moreover, in unduly limiting the definition of "state treasury" to state tax or other general state revenues, Petitioners have fundamentally misinterpreted Eleventh Amendment jurisprudence since the protection of public funds cannot be the sole purpose of Eleventh Amendment immunity.[1] If it were, municipalities, counties, and other political subdivisions should be entitled to the protection of the immunity to protect the public funds entrusted to their authority. But, as noted above, historically they are not.

Notwithstanding the notion that the impetus for the Eleventh Amendment was the states' concern over potential liability for Revolutionary War debts, the Eleventh Amendment finds its continued significance in the vindication of state sovereign prerogatives in the name of

---

[1] Indeed, state treasury funds are reachable, notwithstanding the Eleventh Amendment, under certain circumstances, to wit: an award of attorney fees in an appropriate case or where the funds are to be expended in obedience to an injunction mandating that state officials conform their conduct to the requirements of federal law.

federalism. Consequently, the test developed in *Ford* to identify the proper party to a lawsuit should not be turned into a vehicle for federal court jurisdiction over a state agency.

POINT I

The Port Authority Of New York And New Jersey, As A Direct Agency Of Those States, Was Created To Be Immune From Suit Under The Eleventh Amendment.[2]

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court specifically

> ...granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves.

440 U.S. at 393 (footnote omitted).

---

[2] This same immunity applies no less to PATH, the Port Authority's wholly-owned subsidiary. The Legislatures of the two States have expressly stated that:

> Such subsidiary corporation ... shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities.

N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1990) (RA-12). The legislation also provides that:

> The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. *Id.*

The task was to determine whether in creating the Tahoe Regional Planning Agency (TRPA), California and Nevada had created a state agency or a political subdivision. Thus,

> If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity.

Id. at 401.

In evaluating the TRPA, this Court looked to several factors. It analyzed the language of the compact to determine how the compacting states themselves denominated and considered the agency. So too, it looked to the compact's provisions with respect to how and by whom the agency's governing board was appointed, how the agency was funded, as well as the responsibility or lack thereof of the Compacting States' treasuries for the obligations of the agency. This Court took particular note of the fact that the function performed by the agency, land use planning, was "traditionally a function performed by local governments." *Id.* at 402.

This Court also searched for indicia of state control over the actions of the agency. Of great moment was the fact that there was no "veto at the state level" over the agency's authority to make rules within its own jurisdiction — a characteristic this Court found to be common to cities, towns, and counties as opposed to State agencies (*Id.*). This Court also took note of the fact that the TRPA was so independent of state control that one of the compacting states, California, had "resorted to litigation in an unsuccessful attempt to impose its will" on the agency. 440 U.S. at 402.

Therefore, with respect to TRPA this Court had no choice but to conclude that:

> . . . nothing short of an absolute rule [that any agency created by interstate compact has Eleventh Amendment immunity] would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California. *Id.*

Significantly, however, this Court did not find that any one of these factors was pre-eminent, or, in and of itself, controlling upon the question of Eleventh Amendment immunity. *See*, Point II, *infra*.

In applying the *Lake Country Estates* factors to the Port Authority, no such "absolute rule" is required for a finding of immunity. We shall now show that the Port Authority is entitled to invoke Eleventh Amendment immunity as an arm of the States of New York and New Jersey. *See*, *Port Auth. Police Benevolent Ass'n, Inc. (PBA) v. Port Auth. of N.Y. & N.J.*, 819 F.2d 413 (3d Cir. 1987), *cert. denied*, 484 U.S. 953 (1987).

A. The Port Authority was created to be a State agency, not a political subdivision in the nature of a county or a municipality.

The Port Authority of New York and New Jersey was created by a Congressionally-consented-to Interstate Compact between the two States, 42 U.S. Stat. 174 (1921), consenting to Ch. 154, Laws of New York, 1921; Ch. 151, Laws of New Jersey, 1921. In creating the Port Authority, both States expressly provided that the Port Authority should have those responsibilities and duties which were concurred in by the Legislatures of both States. N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1990) (RA-5).

Significantly, whenever the issue has arisen, the courts of New York and New Jersey uniformly have held that the Port Authority is a direct agency of the two States performing governmental functions on behalf of State government. Unable to refute these holdings, Petitioners improperly ignore this long, unbroken line of authority.

The New Jersey Supreme Court has described the Port Authority as having been created by the two States as their joint agent, to wit:

> In 1921 the Legislatures of New Jersey and New York authorized the execution of the port compact . . . establishing the Port of New York district and creating the Port of New York Authority as their joint agency.

Newark v. Essex County Bd. of Taxation, 54 N.J. 171, 175; 254 A.2d 513, 515 (1969), *cert. denied*, 396 U.S. 987 (1969).

Along the same lines, in *Trippe v. Port of N.Y. Auth.*, 14 N.Y.2d 119, 122-23; 198 N.E.2d 585, 586 (1964), the New York Court of Appeals described the Port Authority as "a governmental agency of the States of New York and New Jersey" and as "a direct agency" of the two States.

A number of decisions recognizing the nature of the Port Authority as a State agency were collected in *Port of N.Y. Auth. v. J.E. Linde Paper Company*, 205 Misc. 110, 113-114; 127 N.Y.S.2d 155, 158-159 (N.Y. Mun. Ct. 1953), wherein the court in unequivocal terms declared that:

> The Port Authority is an arm and agency of the States of New York and New Jersey, and in all of its activities, is engaged in the performance of essential governmental functions. (*Bush Term.*

Co. v. City of New York, 152 Misc. 144, *aff'd*, 282 N.Y. 306; *Commissioner of Internal Revenue v. Shamberg*, 144 F.2d 998, *certiorari denied* 323 U.S. 792; *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 484; *Helvering v. Gerhardt, supra*; *Gaynor v. Marohn*, 268 N.Y. 417, 424, 425; *People ex rel Buffalo & Port Erie Public Bridge Authority v. Davis*, 277 N.Y. 292, 299; *Port of New York Authority v. Township of Weehawken*, 27 N.J. Super. 328; *Sullivan v. Port of New York Authority*, 134 N.J.L. 124; *Miller v. Port of New York Authority*, 18 N.J. Misc. 601, 606).

The court went on to say:

> The Port Authority has uniformly been held to be in the position of "the State" whenever the issue has arisen.

Id.

In *Voorhis v. Cornell Contracting Corp.*, 170 Misc. 908, 912; 10 N.Y.S.2d 378, 381 (City Ct. N.Y. Co. 1938), the court referred to the Port Authority as the "immediate agent of two sovereigns," and said:

> Indeed, it is hard to see how there could be a clearer instance of an agency sharing the immunity of its creators.

Similarly, the New Jersey Supreme Court, in *Miller v. Port of N.Y. Auth.*, 18 N.J. Misc. 601, 606; 15 A.2d 262, 266 (Sup. Ct. 1939) said:

> Since the Authority is undoubtedly a direct state agency, exercising an essential governmental function, and, is therefore, an *alter ego* of the state, it follows that the present action is, in effect, a suit against the state itself which would,

> as we have seen, be clothed with sovereign immunity, unless a waiver or consent can be found in our State Constitution or in some special enactment.

More recently, in *Port Auth. of N.Y. & N.J. v. Bosco*, 193 N.J. Super. 696; 254 A.2d 676 (App. Div. 1984) (*per curiam*), cited by the Third Circuit in *PBA*, 819 F.2d at 418, the Appellate Division of the New Jersey Superior Court held that the Port Authority, as a State agency, shared New Jersey's sovereign exemption from the bar of the running of the statute of limitations. The Court explicitly held:

> Until 1951 the Port Authority "as an arm and agency of the states," enjoyed sovereign immunity from suit. See cases collected at *Port of N.Y. Authority v. Weehawken Tp.*, 27 N.J. Super. 328, 333 (Ch. Div. 1953), *rev'd other grounds*, 14 N.J. 570 (1954). *We see no merit to defendants' contention that because the Legislature abrogated this particular attribute of sovereignty by N.J.S.A. 32:1-157 the status of the Port Authority as a state agency was thereby withdrawn in all other respects.*

193 N.J. Super. at 700; 254 A.2d at 678 (emphasis supplied).

Completely ignoring this entire line of authority, Petitioners cite, as militating against the Port Authority's State agency status, the provision in the 1922 bi-State legislation describing the Authority as a "municipal corporate instrumentality of the two states." N.Y. Unconsol. L. §6459 (McKinney 1979); N.J.S.A. 32:1-33 (West 1990) (RA-10). However, as the above discussion makes plain, "municipal corporate instrumentality" is but one of many terms that have been used to describe the Port Authority. *See*, *PBA*, 819 F.2d at 414-15.

Indeed, more than a half century ago this very Court described the Port Authority as "a state instrumentality created by New York and New Jersey" and termed its work a "function which New York and New Jersey had undertaken to perform." *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 484 (1939).

Despite Petitioners' efforts in their Brief to establish in excrutiating detail the meaning of the term "body corporate and politic" under federal and state law, the fact is that no court, when squarely confronted with the question of the status of the Port Authority as a municipal corporation in contrast to that of a State agency, has so characterized the agency. See *Whalen v. Wagner*, 4 N.Y.2d 575, 584; 152 N.E.2d 54, 57-58 (1958), where the question was whether legislation dealing with the Port Authority required a Home Rule Message:

> There is no question, we think, that the legislation dealing with the Port Authority did not require a city message. The Port Authority is and of necessity has to be a State agency in view of its dual State character and functions.

Nearly fifty years ago in *Howell v. Port Auth.*, 34 F.Supp. 797 (D.N.J. 1940) a federal district court quite convincingly explained:

> The ordinary significance of the term municipal corporation is a city, town or village which is an incorporation of its inhabitants, governed by elected bodies having local self-government, with power to tax and without the obligation to report its activities directly to the executive branch of government.

> The Authority is not an incorporation of its inhabitants, but a Board of Commissioners appointed by officials elected by the states at large. The persons who inhabit The Port District have no direct right of vote with respect to the activities of The Authority.
>
> • • •
>
> The *legislatures*, in drafting §8 of the Comprehensive Plan did *not use the common and familiar term municipal corporation but the uncommon municipal corporate instrumentality, yet in the same context or framework, they used the word municipality to designate cities, towns and villages, and it seems unlikely, they would ignore the common and known term municipal corporation and select an uncommon term if they wished to establish a municipal corporation, as the Bank contends.* Further therein, pledging the credit of either state is prohibited. This would be totally unnecessary if the complainant's interpretation of municipal corporate instrumentality is accepted, ...

34 F.Supp. 797, 800 (emphasis added).

Thus, in *PBA*, the Third Circuit was able to rely upon the fact that the "long-standing judicial characterization of the Authority [as a state agency] has never been questioned by either state legislature despite the numerous opportunities to overrule these decisions. . . ." 819 F.2d at 415 (matter in brackets added).

B. The Port Authority is administered as a State agency.

Again, in sharp contrast to the facts before this Court regarding TRPA in *Lake Country Estates, supra,* where this Court was impressed by California's difficulty in controlling the actions of the agency, in the instant case, the Port Authority is clearly administered as a State agency. *See, inter alia, Mineo v. Port Auth. of N.Y. & N.J.*, 779 F.2d 939, 949 (3d Cir. 1985), *reh'g and reh'g en banc denied*, 783 F.2d 42 (3d Cir. 1986), *cert. denied*, 478 U.S. 1005 (1986). (Held: The Port Authority is the "State" for Tenth Amendment purposes.)

While TRPA's governors for the most part were county appointees, the Port Authority's twelve Commissioners are appointed by the State Governors – six by the Governor of New York and six by the Governor of New Jersey – and each must be confirmed by their respective State Senates. The Commissioners are chosen in the manner prescribed, and for terms fixed and determined from time to time, by the Legislature of each State. *See*, N.Y. Unconsol. L. §6405 (McKinney 1979); N.J.S.A. 32:1-5 (West 1990) (RA-10).[3] New York Commissioners may be removed upon charges and after a hearing by the Governor of the State (Section 4, Chapter 422, Laws of New York, 1930) and New Jersey Commissioners may be removed upon charges and after a hearing by the State Senate. (Section 4, Chapter 245,

[3] The first New Jersey Commissioners of the Authority were appointed to their office by the New Jersey Legislature itself (Ch. 152, Laws of N.J., 1921), while the New York Commissioners were named by the Governor of New York, with the advice and consent of the State Senate (Ch. 203, Laws of N.Y., 1921). In 1930, when the States transferred their Holland Tunnel to the Port Authority to operate as their agent, the New York Legislature designated by name three of the six New York Commissioners. (Ch. 422, Laws of N.Y., 1930).

Laws of New Jersey, 1930), codified as N.J.S.A. 32:2-5 (West 1990) (RA-25). Port Authority Commissioners take the oath of office constitutionally mandated for State officers by their respective States.

Furthermore, as recognized by this Court in *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1,4 (1977), the Port Authority possesses no powers that have not been delegated to it by the Legislatures of the Compacting States. N.Y. Unconsol. Laws §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1990) (RA-5). Indeed, in this regard, we note that in *Port of N.Y. Auth. v. Weehawken Township*, 14 N.J. 570; 103 A.2d 603 (1954), the New Jersey Supreme Court held that the Port Authority could not construct a third tube to the Lincoln Tunnel for the reason that the required express legislative authorization by the States was lacking. Thus, the New Jersey Supreme Court, per then New Jersey Supreme Court Justice Brennan, specifically held:

> ...it is our duty to declare the law to be as the Legislature has written it. It follows that *the Port Authority has no authority to proceed with the construction of the third tunnel until expressly authorized to do so by the two States.*

14 N.J. at 580; 103 A.2d at 608 (emphasis added).

Moreover, the Port Authority Compact provides for a gubernatorial veto power pursuant to which the Governor of either State retains the right to veto the actions of the Commissioners appointed from that State. N.Y. Unconsol. L. §6417 (McKinney 1979); N.J.S.A. 32:1-17 (West 1990) (RA-4).[4] The Governor of New Jersey possesses the

[4] The same gubernatorial veto power applies equally to the actions of PATH. N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1990) (RA-12).

veto power pursuant to N.J.S.A. 32:2-6 (West 1990); the Governor of New York, pursuant to N.Y. Unconsol. L. §§7151 *et seq.* (McKinney 1979) (RA-19).

The power to veto Commissioner actions naturally has led to close cooperation between both Governors and the Authority. In fact, the District of Columbia Circuit, in reversing the contempt of Congress conviction of a Port Authority official, specifically noted that:

> After being denied the opportunity to appear before the Subcommittee, the Governors wrote identical letters to their respective representatives on the Board of Commissioners of the Authority, instructing them to direct appellant not to comply with the subpoena. The Board of Commissioners so directed appellant on June 27, 1960.

Tobin v. United States, 306 F.2d 270, 271-72 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962).

As summarized by the Court of Appeals, a major issue raised by the Port Authority in this litigation was:

> 2. That "the subpoena issued by the Subcommittee, demanding documents relating to the internal administration of the Port Authority which the Governors of New York and New Jersey ordered appellant not to produce, [was] an unconstitutional invasion of powers reserved to the States under the Tenth Amendment to the Constitution."

Id. at 272.

It is significant that in making this argument the Port Authority and its official were supported by the Attorneys General of both New York and New Jersey. It is, indeed, difficult to imagine a more vivid example than this

controversy between the Port Authority and the States, on one side, and a Subcommittee of Congress, on the other, of the fact that the Port Authority is considered by the two States to be their direct instrumentality performing important governmental functions on their behalf.

Some additional examples of State control over Port Authority administration are the Port Authority's obligation to submit an annual report to the Legislatures, N.Y. Unconsol. L. §6408 (McKinney 1979); N.J.S.A. 32:1-8 (West 1990) (RA-5); the State Comptroller's authority to examine the Port Authority's books and accounts, N.Y. Unconsol. L. §7071 (McKinney 1979); N.J.S.A. 32:2-31 (West 1990) (RA-16); and the requirement of concurrence by the Legislatures before Port Authority rules and regulations become effective, N.Y. Unconsol. L. §6419 (McKinney 1979); N.J.S.A. 32:1-19 (West 1990) (RA-9).

Petitioners, citing *People v. Port of N.Y. Auth.*, 64 Misc.2d 563; 315 N.Y.S.2d 9 (Sup.Ct. N.Y.Co. 1970), mistakenly assert that inasmuch as the New York Attorney General has sought injunctive relief against this agency, "the Port Authority is not an arm of a state . . . subject to its control" (Petitioners' Brief at 30). The point that Petitioners miss is that when the States enacted the Authority's suability statute, their "declared policy" was "not to waive the Port Authority's immunity from injunctive suit by private individuals." *Lewis v. Lefkowitz*, 32 Misc.2d 434, 436, 437; 223 N.Y.S.2d 221, 223 (Sup.Ct. N.Y.Co. 1961), aff'd 17 A.D. 2d 778 (1st Dept. 1962). Rather, under the statute, "[t]his right is given only to the Attorney General who may, in his discretion, bring such suit on behalf of any individual." 32 Misc.2d at 436, 323 N.Y.S.2d at 222.[5]

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[5] *See* N.Y. Unconsol. L. §7105 (McKinney 1979); N.J.S.A. 32:1-161 (West 1990) (RA-18).

In commenting on this statutory provision, the New Jersey Supreme Court has said:

> Presumably, in enacting these identical statutes, both legislatures feared the immobilization of important public projects of the Port Authority and the attendant diversion of resources which might result from suits for injunctive relief. They sought to ensure, through these statutes, that only those suits first screened by a responsible public official might be brought.

Evans-Aristocrat Indus., Inc. v. City of Newark & Port Auth. of N.Y. & N.J., 75 N.J. 84, 90; 380 A.2d 268, 274 (1977).

Other cases which have commented on the Attorney General's statutory authorization to seek injunctive relief include *Wolkstein v. Port of N.Y. Auth.*, 178 F.Supp. 209, 213 (D.N.J. 1959) and *New York City Chapter of Nat'l Elec. Contractors Ass'n v. Fabber, et al.*, 73 Misc.2d 859, 861; 343 N.Y.S.2d 33, 35 (Sup.Ct. N.Y.Co. 1973) where the court said:

> It may be noted that pursuant to the compact and subsequent legislation, the Port Authority *on behalf of the 2 member states* owns or operates some 24 public terminal, transportation and other facilities within the port district, including 6 marine terminals. (Emphasis added).

Consequently, a private litigant's inability to obtain injunctive relief against the Port Authority without the Attorney General's presence, is proof, not lack of proof, that this agency partook of the States' sovereign immunity from suit.

Petitioners further argue that the Port Authority cannot be "subject to the control of the compacting states" (Petitioners' Brief at 31), citing the agency's opposition to

one particular 1958 New Jersey Assembly bill which would have required the Port Authority to operate passenger trains between New York and New Jersey. There are several problems with Petitioners' argument.

First of all, the activity apparently was in reference to the "legislative goals" of but one of the Compacting States. Petitioners have not and simply cannot establish that New York at that time was in agreement with this particular New Jersey "legislative goal." As Petitioners themselves point out, the Port Authority as an interstate agency, can act only in the behest of both States.[6] The fact is that in 1962, at the urging of and with the authorization of the two States the Port Authority *did assume* and has since operated a mass transit system between the two States. That system is the Port Authority Trans-Hudson Corporation, the Respondent in this matter.

Furthermore, it is not unusual for state agencies, be they interstate or single-state, to actively support or oppose a specific piece of legislation. Indeed, this Court may take notice of the fact that such activity is seen at the federal level as well. PATH respectfully submits that this is a normal incident of the political process in a government structured by separation of powers, where the executive and legislative may disagree.

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[6] In this regard we note that Petitioners' argument that the States, in their words, "relinquished" some aspect of their sovereignty in entering into the Interstate Compact creating the Port Authority is a *non sequitur* (Petitioners' Brief at 16). Petitioners have not and, indeed, cannot offer any support for their conclusion, which does not necessarily follow, that states are thereby unable to vest compact agencies with Eleventh Amendment immunity. Indeed, Petitioners are here arguing for a *per se* rule with respect to compact agencies which this Court implicitly rejected by employing its analysis in *Lake Country Estates, supra.*

Finally, the Port Authority can act only through its Board of Commissioners, who, as we have seen, are appointed by the Governors of the two States and whose actions are subject to gubernatorial veto. This certainly was true of the "safeguard" referred to in *United States Trust*, 431 U.S. at 8.

In sum, the Port Authority's Compact and subsequently enacted bi-State authorizing legislation make it quite clear that the Port Authority indeed is "in fact an arm of the State subject to its control..." within the meaning of this Court's opinion in *Lake Country Estates*, 440 U.S. at 402.

C. The Port Authority performs State, not local, functions.

TRPA, this Court noted in *Lake Country Estates, supra*, was engaged in "land use planning", which it characterized as "traditionally a function performed by local governments." 440 U.S. at 402. The instant case is thus easily distinguishable since the Port Authority, as noted above, is and has always been held to be an agency of the States created to carry out State functions, such as vehicular crossings and a unified air terminal network, which the Compacting States individually cannot efficiently perform because of the complication of competing sovereignties.

Contrary to Petitioners' position (Petitioners' Brief at 27), that the Port Authority performs State, and not local, governmental functions was the precise holding of the New York Court of Appeals in *Whalen v. Wagner, supra*. There the court, in ruling that no home rule message was necessary under the New York Constitution in connection with Port Authority legislation, expressly stated that prior

cases "...establish the Port Authority to be engaged in matters of State concern." 4 N.Y. 2d at 582; 152 N.E. 2d at 57.

That *Whalen v. Wagner*'s holding is correct is seen in the Preamble to the Compact of April 30, 1921 where the State Legislatures declared, in relevant part, as follows:

> Whereas,...the commerce of the port of New York has greatly developed and increased and *the territory in and around the port has become commercially one center or district;* and
>
> Whereas, It is confidently believed *that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey;*[7] and

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[7] In addition we point out that access to Port Authority facilities is not limited to residents of the port district. Moreover, as will be more fully developed in subpoint D, *infra*, ten years after this legislative declaration in the Preamble, in enacting the general reserve fund legislation, specifically, N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1990) (RA-15), the Legislatures provided that any surplus Port Authority revenues be distributed as directed by the States. There is no restriction in that legislation that the distribution of such excess revenues be only within the Port of New York District. Thus, irrespective of any "localized" nature of Port Authority activities, the Authority is a State agency.

In this connection, indicative of the States' intention that the Port Authority be considered a State rather than a local instrumentality is the fact that the States adopted their 1921 Compact which created this agency in the form of an amendment to their 1834 agreement in which they settled a long standing boundary dispute. The 1834 agreement received the consent of Congress, 4 U.S. Stat. 708 (1834).

> Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money *and the cordial co-operation of the states of New York and New Jersey* in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and
>
> Whereas, Such result can best be accomplished through the *co-operation of the two states by and through a joint of common agency;*

N.Y. Unconsol. Laws §6401 (McKinney 1979); N.J.S.A. 32:1-1 (West 1990) (emphasis supplied) (RA-1).

As the district court observed in *Howell, supra:*

> The Port Authority, a bi-state corporation (*Helvering, etc. v. Gerhardt*, 304 U.S. 405, 58 S.Ct. 969, 82 L.Ed. 1427), is a joint or common agency of the States of New York and New Jersey. It *performs governmental functions which project beyond state lines,...*

34 F.Supp. at 801. (emphasis added).

Indeed, Petitioners argue that the Port Authority should not share the States' Eleventh Amendment immunity citing as support for their position (Petitioners' Brief at 29) the provision in the Authority's Hudson Tubes-World Trade Center legislation which provides that all details of operating these facilities shall be within the Authority's sole discretion and its decision concerning such matters shall be controlling and conclusive; and further that no agency, commission or municipality of either State shall have jurisdiction over such facilities. N.Y. Unconsol. L. §6612 (McKinney 1979); N.J.S.A. 32:1-35.61 (West 1990)

(RA-12). Similar provisions can be found in other Port Authority legislation as well.[8]

We submit that these provisions, far from supporting the proposition that the Port Authority should not be accorded the States' Eleventh Amendment immunity, prove just the opposite. They—together with the statute's declaration that the effectuation of these projects by the Port Authority will be for the benefit of the people of the two States and that the Authority, in carrying out its responsibilities concerning these projects, shall be regarded as performing an essential governmental function[9]—reflect the clear bi-State legislative policy that, in developing and operating its facilities, the Port Authority stands in the shoes of the Compacting States themselves. In fact, it is precisely because the Port Authority functions as the

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[8] *See, e.g.*, Bridge and Tunnel Unification Act, N.Y. Unconsol. L. §§6502, 6512 (McKinney 1979); N.J.S.A. 32:1-119, 32:1-128 (West 1990); Air Terminal Act, N.Y. Unconsol. L. §§6631, 6634 (McKinney 1979); N.J.S.A. 32:1-35.1, 32:1-35.4 (West 1990); Bus Project Act, N.Y. Unconsol. L. §7201 (McKinney 1979); N.J.S.A. 32:2-23.27 (West 1990); Industrial Development Project Act, N.Y. Unconsol. L. §7180 (McKinney 1979); N.J.S.A. 32:1-35.59 (West 1990).

[9] The Port Authority's Hudson Tubes—World Trade Center legislation provides that the effectuation of these projects:

> ...are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. L. §6610 (McKinney 1979); N.J.S.A. 32:1-35.59 (West 1990) (RA-11).

proxy or *alter ego* of the States that the Legislatures provided that no other agency of either State can review its determinations – determinations which, we emphasize, are always subject to gubernatorial veto.[10]

D. The insulation of the States' tax and other general revenues from judgments against the Port Authority does not mean that Port Authority revenue is not State revenue.

Although it is true that the Port Authority may not draw upon State tax revenue nor pledge the credit of the States, it is equally true that the assets it administers as agent for the two States are held for the benefit of the people of the States. The Legislatures of the Compacting States in authorizing the Port Authority to expend funds in the effectuation of various projects have expressly stated that the undertaking of such projects is for the benefit of the people of the two States. Thus, as noted above, in authorizing the Port Authority to operate PATH, the Legislatures explicitly stated:

> The effectuation, of... the Hudson tubes and the Hudson tubes extensions,... are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase in their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

[10] The only exception is with respect to the power of the New Jersey Governor to veto the minutes relating to fixing of tolls for Port Authority bridges. N.J.S.A. 32:2-9 (West 1990)

N.Y. Unconsol. L. §6610 (McKinney 1979); 32:1-35.59 (West 1990) (RA-11). Similar statements can be found in legislation authorizing the effectuation of other public projects by the Port Authority.

Furthermore, even though the Port Authority cannot legally impose any financial obligation upon the States, bi-State legislation demonstrates not only that the States view the Authority as their agent in effectuating the public projects which they authorize, but the legislation also discloses a close, meaningful relationship between State and Port Authority finances. This close financial relationship, we believe, demonstrates the extremely unrealistic, myopic view of the Petitioners' definition of what constitutes a "state treasury".

Thus, in its early years, the Port Authority was supported by State appropriations until its revenues became adequate to meet its expenses. N.Y. Unconsol. L. §6416 (McKinney 1979); N.J.S.A. 32:1-16 (West 1990) (RA-6). And when it appeared that the Authority faced a default on its Series "A" bonds which were issued to finance its two Arthur Kill bridges – the Outerbridge Crossing and the Goethals Bridge – the States transferred their Holland Tunnel (together with its revenue flow) to the Port Authority. The Holland Tunnel was the first vehicular crossing to be constructed between the States. It was built by separate State Commissions, acting jointly, pursuant to a 1919 Interstate Compact to which Congress consented, 41 U.S. Stat. 158 (1919).

In the words of Erwin W. Bard in his *The Port of New York Authority* (Columbia University Press, 1942), the Holland Tunnel was transferred in order, *inter alia*,

> ...to safeguard the Port Authority's previous commitments... The Holland Tunnel... earned

> in 1930 a net income...of $5,034,094. By transferring its income to the Port Authority and anticipating its eventual refinancing, an annual surplus between $1,000,000 and $1,500,000 could be expected. This would be sufficient to save the bridge bonds...at p. 238

After noting that the transfer of the Holland Tunnel to the Port Authority was designed "to help place the Port Authority on a self-sustaining basis," the court in *United States Trust Co. v. State of N.J.*, 134 N.J. Super. 124, 141; 338 A.2d 833, 842 (L. Div. 1975), *aff'd*, 69 N.J. 253; 353 A.2d 514 (1976), *rev'd*, 431 U.S. 1 (1977), went on to say that "Simultaneously, the states enacted...the General Reserve Fund Act." This legislation required that the Authority pool the surplus revenues it derived from the facilities it constructed or acquired through the issuance of its bonds, notes, or other obligations, and establish a general reserve fund. N.Y. Unconsol. L. §7002 (McKinney 1979); N.J.S.A. 32:1-142 (West 1990) (RA-15). As described in *United States Trust Company, supra:*

> The act pledges the general reserve fund as security for ...bonds...issued by the Authority. Surplus moneys of the Authority in excess of the general reserve fund requirements may be used for any purpose authorized by the states.

Id.

Thus, the two Legislatures not only directed the use and flow of Port Authority revenue, but made it quite clear that any surplus revenue could be utilized as authorized by the two States.

Finally, the budget of this agency, since it is both adopted and administered by a Board of Commissioners

appointed by the Governors and subject to gubernatorial veto, is hardly akin to that of any other type of political subdivision in either State. Also unlike political subdivisions, which generally are recipients of State monies, Port Authority funds, as previously noted, are used for projects authorized by the State Legislatures, thus providing the States with alternative means of financing and effectuating important public projects. For example, the Legislatures have recently authorized the Port Authority to purchase buses which it leases *without charge* to public and private transportation entities in both States, N.Y. Unconsol. L. §§7201 *et seq.* (McKinney Supp. 1989); N.J.S.A. 32:2-23.27 *et seq.* (West 1990)[11] (RA-22-RA-24). Effectuation of the States' 440 million dollar Bus project (1993 Annual Report at 66) is only possible if there are sufficient Port Authority funds available. Money being fungible, the unavailability of Port Authority funds as a result, for example, of having to pay a money judgment would mean that the two States would have to look to their general treasuries to fund important projects or else deny the public the benefit of such services.[12] In that sense, then, the Port

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[11] Significantly, for purposes of the Bus project, the port district was legislatively expanded to a radius of seventy-five miles around the Port Authority Bus Terminal. *See*, N.Y. Unconsol. L. §7202 (10) (McKinney Supp. 1989); N.J.S.A. 32:2-23.28 (j) (West 1990) (RA-25).

[12] Additionally, it should be emphasized that the Port Authority, in recent years, working closely with both Governors and pursuant to legislative authorization of 250 million dollars (1993 Annual Report at 65), is spending many millions of dollars for economic development and infrastructure renewal in the two States.

For example, at the request of the Governor of New Jersey, the Port Authority has authorized expenditures, pursuant to its Marine Terminal legislation, specifically, N.Y. Unconsol. L. §6673 (McKinney Supp. 1989); N.J.S.A. 32:1-35.30 (West 1990) (RA-14), to provide

(Footnote continued)

Authority's money is a component of a "state treasury" since Port Authority money is being used for the benefit of the people of the two States for projects which must be authorized by their Legislatures.

Indeed, the New Jersey Supreme Court looking at this relationship between the States and the Port Authority in realistic pragmatic terms indicated that there can be multiple "state treasuries" when it said:

> ...the general taxpayer too has an interest in such agencies [as the Port Authority]. First, he might be asked to provide the facilities if the State could not supply them through the agency. In fact the Holland Tunnel [which the Port Authority has operated since 1930] was built with the funds of the States. Next, these agencies may also furnish facilities that are not self-supporting and hence would burden the general taxpayer if furnished directly by the State. This, we gather, is true of the Port Authority. Further, it may be doubted as a practical matter that government would walk away from an agency which founders;

improvements to Conrail's northern branch lines for its freight operations in order to permit the New Jersey Department of Transportation to provide a light-rail transit way to improve regional passenger transportation. Similarly, at the request of the Governor of New York, the Port Authority has authorized expenditures, pursuant to its Industrial Development legislation, specifically, N.Y. Unconsol. L. §7172(e) (McKinney 1979); N.J.S.A. 32:1-35.73(e)(West 1990) (RA-20-RA-21), for the construction of the Center for Advanced Technology Telecommunications, which is to be a part of a major redevelopment in downtown Brooklyn known as Metrotech. The commitment to the New York State Department of Transportation's Oak Point Freight Rail Link Project alone is over 106 million. (1993 Annual Report at 66) These expenditures, like the Bus project, do not provide revenues for the Port Authority.

> financial failure would prejudice the acceptance of the bonds of other agencies of the same sovereign. And finally, the net assets of these agencies belong to the States that created them, and the taxpayers and citizens will profit from the use to which they are put after the bonds are liquidated.

Port of N.Y. Auth. v. Hackensack Water Co., 41 N.J. 90, 106, 107; 195 A.2d 1, 17, 18 (1963).[13]

Thus, we submit that in a practical down-to-earth sense a judgment against the Port Authority ultimately has the same effect as one against the Compacting States themselves and, therefore, the Port Authority meets this *Lake Country Estates* criterion as well. In this connection, we note that Petitioners stress the fact (Petitioners' Brief at 38) that the Port Authority, pursuant to statute, places its surplus revenues in a general reserve fund which it pledges as security for its obligations. They fail to mention, however, the further provision, fully set forth above, in the Authority's General Reserve Fund Act that permits the States to direct the flow of surplus reserve fund revenue.

[13] Although the Port Authority has liquidated many of its prior series of bonds, at the present time it has nearly $5.8 billion in outstanding obligations. (*See* 1993 Annual Report at 41.) This is because, over the years, existing Authority facilities had to be modernized and expanded, and the States have periodically assigned new powers and duties to this agency. As already noted, the Authority continues to provide the States with important new facilities, including non-revenue producing projects relating to economic development and infrastructure renewal and, of course, this agency continues to operate, on behalf of the States, deficit facilities such as PATH.

POINT II

The Argument That The Port Authority Cannot Be A State Agency For Eleventh Amendment Purposes Results From A Misinterpretation Of Eleventh Amendment Jurisprudence.

We respectfully submit that the Petitioners' analysis of the "state treasury" factor is defective. More specifically, the notion that the phrase "state treasury" is referable only to state tax or other general state revenues constitutes a fundamental misinterpretation of Eleventh Amendment jurisprudence.

In *Lake Country Estates*, in acknowledging this factor as but one of the elements to be weighed, this Court made the simple observation that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." 440 U.S. at 400-01 (footnote omitted). Apart from the fact that requiring that a judgment "have the same practical consequences as a judgment against the State", actually indicates that a judgment *need not* be paid from general state revenue, nowhere in the *Lake Country Estates* opinion is there any indication that this factor is, *by itself*, controlling. Indeed, in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 n.11 (1984), this Court held that suits against the sovereign are found not only where the judgment "would expend itself on the public treasury", but also where the public administration would be interfered with or a judgment would either compel or restrain the government in its actions, citing, *Dugan v. Rank*, 372 U.S. 609, 620 (1963). In point of fact, suits seeking injunctive relief against the state are as much barred by the Eleventh

Amendment as are suits for money damages. *See, inter alia, Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

Moreover, an overly restrictive view of what constitutes a "state treasury" is a result of a fundamental misinterpretation of Eleventh Amendment jurisprudence. The purpose of the Eleventh Amendment cannot be merely to protect "public" funds. If it were, cities and counties, whose funds are just as "public", should be entitled to invoke the immunity. Yet they are not. *See, Lake Country Estates*, 440 U.S. at 401; *Mount Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-1 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).[14] Rather, the Eleventh Amendment, as this Court has counseled time and again, embodies the recognition of state sovereignty as a limitation upon the Article III judicial power.

Indeed, in *Ford Motor Co. v. Dep't of Treasury of State of Indiana*, 323 U.S. 459 (1945), cited by Petitioners and in *Lake Country Estates, supra*, and the case most often cited for the importance of the "state treasury" factor, this Court's focus upon the potential liability of the State treasury was for the purpose of determining who was, in fact, the real party in interest since individuals were nominal defendants, and a point apparently had been raised that the presence of such individuals as named defendants created federal court jurisdiction. This Court's words are clear and admit of no other interpretation:

> And when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled

[14] The *Lincoln County* Court did not really articulate a reason for differentiating between the State and political subdivisions for this purpose. Apparently what has developed is a purely historical distinction.

> to invoke its sovereign immunity from suit even though individual officials are nominal defendants. (citations omitted)

323 U.S. at 464. Similarly, in *Edelman v. Jordan*, 415 U.S. 651, *reh'g denied*, 416 U.S. 1000 (1974), cited by Petitioners, again the focus on the "state treasury" was for the purpose of identifying the real party in interest where state officials were the only named defendants.[15] Furthermore, both *Edelman* and *Ford* preceded *Lake Country Estates* with its specific test for Eleventh Amendment immunity.

Notwithstanding Petitioners' allusion to the notion that the states' concerns over potential liability for Revolutionary War debts was the impetus for passage of the Eleventh Amendment, that the protection of state treasury funds is not this Court's *raison d'etre* for Eleventh

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[15] In *Edelman* this Court stated:

> [T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.

415 U.S. at 663. While that proposition is certainly true, it does not necessarily then follow that if a judgment is not paid from a state's general tax coffers, Eleventh Amendment immunity cannot be found under *Lake Country Estates, supra*. However, PATH respectfully submits that its treasury, dedicated to state governmental purposes, N.Y. Unconsol. §6610 (McKinney 1979); N.J.S.A. §32:1-35.59 (West 1990) (RA-11), its uses legislatively constrained, N.Y. Unconsol. §§6404, 6408 (McKinney 1979); N.J.S.A. §§32:1-4, 32:1-8 (West 1990) (RA-2, RA-5), and subject to gubernatorial veto, N.Y. Unconsol. §6612 (McKinney 1979); N.J.S.A. §32:1-35.57 (West 1990) (RA-12), is a state treasury within the meaning of *Ford*, *Edelman*, and *Lake Country Estates*.

Amendment immunity is also well-established by the fact that the Eleventh Amendment is not necessarily a bar to such funds being expended in an award of attorney's fees. *See, Kentucky v. Graham*, 473 U.S. 159, 170-71 (1985); *Hutto v. Finney*, 437 U.S. 678, 695 (1978). Nor is the Eleventh Amendment a defense when these funds are expended in obedience to the dictates of an injunction mandating that state officials conform their conduct to federal law. *See, Quern v. Jordan*, 440 U.S. 332, 338 (1979); *see also, Milliken v. Bradley*, 433 U.S. 267, 289 (1977).

The fact is, as this Court repeatedly has emphasized, that the Eleventh Amendment finds its continuing significance in the vindication of state sovereign prerogatives. *See, Pennhurst, supra*, "we must be guided by '[t]he principles of federalism that inform Eleventh Amendment doctrine' ", 465 U.S. at 100, citing *Hutto, supra*, 437 U.S. at 691. If that is so, of what possible moment is it in how many or in what particular coffers the state chooses to divide up its assets? PATH respectfully submits that the test developed in *Ford, supra,* to determine the real party in interest to a lawsuit should not be turned into a vehicle for federal court jurisdiction over a state agency.

Thus, while it is certainly open to this Court to restrict the term "state treasury" for Eleventh Amendment purposes, PATH respectfully submits that it nevertheless would be in derogation of the "principles of federalism" to disqualify an entity like the Port Authority, which, as we fully established in Point I, *supra,* and, as found by the Third Circuit, clearly "functions as an agency of the state...." *PBA*, 819 F.2d at 417.

In point of fact, far from stressing the "state treasury" factor, this Court's opinion in *Lake Country Estates*, is

more properly read as being directed at, not surprisingly in view of the Eleventh Amendment's deference to state sovereignty, the intention of the states in creating the agency, with the agency's financial structure being just one factor in gleaning that intention. Thus, this Court has made it clear that the appropriate judicial inquiry is whether:

> ...there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose....

Lake Country Estates, 440 U.S. at 401. The Third Circuit in *PBA*, did just that, finding:

> ...although the Authority is no longer directly funded by the states, we conclude that the *history* of its financial structure, and the *statutory constraints* placed on the use of its funds, indicate that *the Authority is considered an arm of the states by New York and New Jersey*.

819 F.2d at 416 (emphasis supplied).[16]

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[16] It should be noted that Petitioners have misinterpreted the Third Circuit's decision in *PBA* in arguing that the *PBA* holding was based on an erroneous finding that the two States were statutorily obligated to make appropriations should a judgment against the Port Authority deplete its resources (Petitioners' Brief at 37-39). That particular language in *PBA*, however, is just as consistent with a finding that the States, in carrying out their solemn obligations pursuant to the bi-State Compact, would make such an appropriation. In essence, this is what occurred, when, as previously pointed out, the Port Authority faced the prospect of financial ruin due to an impending default on its early bridge bonds. As we have seen, the States then came to its rescue by their transfer of the financially successful Holland Tunnel to the Authority.

(Footnote continued)

In sum, *Lake Country Estates* clearly established that the focus of judicial inquiry in Eleventh Amendment claims should be directed at determining the intent of the Compacting States. In the case of the Port Authority, the requisite "good reason to believe" that the States intended to create an agency cloaked with Eleventh Amendment immunity is self-evident. For irrespective of its current financial self-sufficiency, in forming the Port Authority in 1921, the States of New York and New Jersey, in fact, did create, and Congress consented[17] to the creation of, an agency that

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So too, Petitioners for some reason find significant the fact that any state appropriation to cover judgments against the Port Authority could not be made without gubernatorial consent. How requiring the consent of the highest elected State official to such an appropriation which, after all, is an ordinary incident of the legislative process, negates State agency status is something of a mystery.

In any event, the *PBA* decision in no way turned upon any such statutory obligation. In fact, the Third Circuit specifically noted that:

> ...the Authority's current funding structure *does not* provide conclusive evidence that the Authority is an agency of the state....

819 F.2d at 416 (emphasis supplied).

[17] Petitioners set great store by the debates preceding Congress' consent to the Comprehensive Plan in an attempt to show that Congress could not have intended "to cloak the Port Authority with Eleventh Amendment immunity" (Petitioners' Brief at 25). Petitioners' reliance is sorely misplaced. As even Petitioners are forced to admit, these Congressional colloquies, expressing concern over the preservation of federal rights and Article I regulatory jurisdiction over the navigable waters within the Port of New York District, quite obviously had nothing whatsoever to do with the Eleventh Amendment whose subject is the Article III judicial power.

Moreover, Petitioners' argument betrays another fundamental misunderstanding of Eleventh Amendment jurisprudence. In sharp

(Footnote continued)

was, in the absence of bi-State legislative consent to suit even in the courts of the Compacting States, "totally immune from suit". *PBA*, 819 F.2d at 418; *accord*, *Howell*, 34 F.Supp. at 801; *Trippe*, 14 N.Y.2d at 123; 198 N.E.2d at 586.

---

contrast to Congress' well-recognized power to abrogate Eleventh Amendment immunity for claims arising under particular federal statutes (*see*, for example, *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (Eleventh Amendment immunity abrogated by the CERCLA statute); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (Eleventh Amendment immunity abrogated by the Civil Rights Act of 1964)), this Court has never held that Congress possesses any power whatsoever "to cloak" an entity with Eleventh Amendment immunity. As this Court made absolutely clear in *Lake Country Estates*, *supra*, the power to cloak a state instrumentality with Eleventh Amendment immunity, resides in the creating states, 440 U.S. at 401.

CONCLUSION

The Order of the Court of Appeals Should Be Affirmed.

Dated: June 15, 1994

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APPENDIX

N.Y. Unconsol. L. §6401; N.J.S.A. §32:1-1

Preamble

Whereas, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson River; and

Whereas, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

Whereas, It is confidently believed that a better coordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

Whereas, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

Whereas, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency.

Now, therefore, The said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:

COMPACT ARTICLE III

N.Y. Unconsol. L. §6404; N.J.S.A. 32:1-4

Port Authority of New York and New Jersey created

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided. On and after July first, nineteen hundred seventy-two, the port authority shall be known and designated as "The Port Authority of New York and New Jersey."

COMPACT ARTICLE IV

N.Y. Unconsol. L. §6405; N.J.S.A. 32:1-5

Commissioners; appointment; term; removal

The port authority shall consist of twelve commissioners, six resident voters from the state of New York, at least four of whom shall be resident voters of the city of New York, and six resident voters from the state of New Jersey, at least four of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New Jersey members by the state of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each state respectively, except as herein provided. Each commissioner may be removed or suspended from office as provided by the law of the state from which he shall be appointed.

COMPACT ARTICLE VI

N.Y. Unconsol. L. §6407; N.J.S.A. 32:1-7

Powers of port authority; comprehensive plan for development of port

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof:[1] and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. . . .

COMPACT ARTICLE VII

N.Y. Unconsol. L. §6408; N.J.S.A. 32:1-8

Additional powers; reports; pledging of credit

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

COMPACT ARTICLE XV

N.Y. Unconsol. L. §6416; N.J.S.A. 32:1-16

Appropriations for expenses

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

COMPACT ARTICLE XVI

N.Y. Unconsol. L. §6417; N.J.S.A. §32:1-17

Quorum; veto power

Unless and until otherwise determined by the action of the legislatures of the two states, no action of the port authority shall be binding unless taken at a meeting at which at least three of the members from each state are present, and unless a majority of the members from each state present at such meeting but in any event at least three of the members from each state, shall vote in favor thereof. Each state reserves the right to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

COMPACT ARTICLE XVII

N.Y. Unconsol. L. §6418; N.J.S.A. 32:1-18

Incurring obligations for expenses

Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article fifteen,[1] prior to the making of appropriations adequate to meet the same.

COMPACT ARTICLE XVIII

N.Y. Unconsol. L. §6419; N.J.S.A. §32:1-19

Rules and regulations

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

N.Y. Unconsol. L. §6459; N.J.S.A. 32:1-33

Powers of port authority and municipalities in executing plan; securities tax exempt; limitations

* * *

"The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

N.Y. Unconsol. L. §6610; N.J.S.A. §32:1-35.59

Purpose

The effectuation of the world trade center, the Hudson tubes and the Hudson tubes extensions, or any of such facilities constituting a portion of the port development project, are and will be in all respects for the benefit of the people of the states of New York and New Jersey, for the increase of their commerce and prosperity and for the improvement of their health and living conditions; and the port authority and any subsidiary corporation incorporated for any of the purposes of this act shall be regarded as performing an essential governmental function in undertaking the effectuation thereof, and in carrying out the provisions of law relating thereto.

N.Y. Unconsol. L. §6612; N.J.S.A. §32:1-35.61

General powers; local laws; subsidiary corporation

* * *

Nothing in this act shall be deemed to prevent the port authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through wholly owned subsidiary corporations of the port authority or from transferring to or from any such corporations any moneys, real property or other property for any of the purposes of this act. If the port authority shall determine from time to time to form such a subsidiary corporation it shall do so by executing and filing with the secretary of state of New York and the secretary of state of New Jersey a certificate of incorporation, which may be amended from time to time by similar filing, which shall set forth the name of such subsidiary corporation, its duration, the location of its principal office, and the purposes of the incorporation which shall be one or more of the purposes of establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project. The directors of such subsidiary corporation shall be the same persons holding the offices of commissioners of the port authority. Such subsidiary corporation shall have all the powers vested in the port authority itself for the purposes of this act except that it shall not have the power to contract indebtedness. Such subsidiary corporation and any of its property, functions and activities shall have all of the privileges, immunities, tax exemptions and other exemptions of the port authority and of the port authority's property, functions and activities. Such subsidiary corporation shall be subject to the restrictions and limitations to which the port authority may be subject, including, but

not limited to the requirement that no action taken at any meeting of the board of directors of such subsidiary corporation shall have force or effect until the governors of the two states shall have an opportunity, in the same manner and within the same time as now or hereafter provided by law for approval or veto of actions taken at any meeting of the port authority itself, to approve or veto such action. Such subsidiary corporation shall be subject to suit in accordance with section nine of this act and chapter three hundred one of the laws of New York of nineteen hundred fifty and chapter two hundred four of the laws of New Jersey of nineteen hundred fifty-one as if such subsidiary corporation were the port authority itself. Such subsidiary corporation shall not be a participating employer under the New York retirement and social security law or any similar law of either state and the employees of any such subsidiary corporation, except those who are also employees of the port authority, shall not be deemed employees of the port authority.

* * *

N.Y. Unconsol. L. §6673; N.J.S.A. 32:1-35.30

Definitions

The following terms as used herein shall mean:

"Marine terminals" shall mean developments, consisting of one or more piers, wharves, docks, bulkheads, slips, basins, vehicular roadways, railroad connections, side tracks, sidings or other buildings, structures, facilities or improvements, necessary or convenient to the accommodation of steamships or other vessels and their cargoes or passengers and shall also mean waterfront development projects. It shall also include such highway projects in the vicinity of a marine terminal providing improved access to such marine terminal as shall be designated in legislation adopted by the two states. Notwithstanding any contrary provision of law, general, special or local, it shall also mean railroad freight projects related or of benefit to a marine terminal or which are necessary, convenient or desirable in the opinion of the port authority for the protection or promotion of the commerce of the port district, consisting of railroad freight transportation facilities or railroad freight terminal facilities; and any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property in connection therewith or incidental thereto, deemed necessary or desirable in the opinion of the port authority, whether or not now in existence or under construction, for the undertaking of such railroad freight projects.

• • •

N.Y. Unconsol. L. §7002; N.J.S.A. §32:1-142

Establishment of general reserve fund

In all cases where the port authority has raised or shall hereafter raise moneys for the establishment, acquisition, construction or effectuation of terminal and/or transportation facilities by the issue and sale of bonds legal for investment, as herein defined and limited, the surplus revenues received by or accruing to the port authority from or in connection with the operation of such terminal and/or transportation facilities built in whole or in part by the proceeds of the sale of such bonds shall be pooled and applied by it to the establishment and maintenance of a general reserve fund in an amount equal to one-tenth (1/10) of the par value of all bonds legal for investment, as herein defined and limited, issued by the port authority and currently outstanding. The moneys in the said general reserve fund may be pledged in whole or in part by the port authority as security for or applied by it to the repayment with interest of any moneys which it has raised or may hereafter raise upon any bonds, legal for investment, as herein defined and limited, and made and issued by it for any of its lawful purposes; and the said moneys may be applied by the port authority to the fulfillment of any other undertakings which it has assumed or may or shall hereafter assume to or for the benefit of the holders of any of such bonds.

Any surplus revenues not required for the establishment and maintenance of the aforesaid general reserve fund shall be used for such purposes as may hereafter be directed by the two said states.

N.Y. Unconsol. L. §7071; N.J.S.A. §32:2-31

Examination of books and accounts

Notwithstanding the provisions of any general or special statutes, the comptroller of the state of New York and the comptroller of the state of New Jersey and their legally authorized representatives are hereby authorized and empowered from time to time to examine the accounts and books of the port of New York authority, including their receipts, disbursements, contracts, leases, sinking fund, investments and such other items referring to their financial standing and receipts and disbursements as such comptroller may deem proper. Such examination may be made by either comptroller at any time or by both comptrollers acting together.

N.Y. Unconsol. L. §7101; N.J.S.A. 32:1-157

Consent to suits against the Port Authority

Upon the concurrence of the state of New Jersey in accordance with section twelve[1] hereof, the states of New York and New Jersey consent to suits, actions or proceedings of any form or nature at law, in equity or otherwise (including proceedings to enforce arbitration agreements) against the Port of New York Authority[2] (hereinafter referred to as the "Port Authority"), and to appeals therefrom and reviews thereof, except as hereinafter provided in sections two through five,[3] inclusive, hereof.

N.Y. Unconsol. L. § 7105; N.J.S.A. 32:1-161

Actions for injunction against the Authority

The foregoing consent does not extend to suits, actions or proceedings for judgments, orders or decrees restraining, enjoining or preventing the port authority from committing or continuing to commit any act or acts, other than suits, actions or proceedings by the attorney general of New York or by the attorney general of New Jersey — each of whom is hereby authorized to bring such suits, actions or proceedings in his discretion on behalf of any person or persons whatsoever who requests him so to do except in the cases excluded by sections two, three and four of this act; provided, that in any such suit, action or proceeding, no judgment, order or decree shall be entered except upon at least two days' prior written notice to the port authority of the proposed entry thereof.

N.Y. Unconsol. L. §7151; N.J.S.A. 32:2-6 et seq.

Action of commissioners to be approved or vetoed by Governor

Except as provided by this act,[1] no action taken at any meeting of the port of New York authority[2] by any commissioner appointed from the state of New York shall have force or effect until the governor of the state of New York shall have an opportunity to approve or veto the same under the provisions of article sixteen of the port compact or treaty entered into between the states of New York and New Jersey, dated April thirtieth, nineteen hundred and twenty-one.[2]

N.Y. Unconsol. L. §7172; N.J.S.A. 32:1-35.73

Definitions

The following terms as used herein shall have the following meanings:

* * *

e. "Industrial development project or facility" or "port district industrial development project or facility" shall mean any equipment, improvement, structure or facility or any land, and any building, structure, facility or other improvement thereon, or any combination thereof, and all real and personal property, located within the New York portion of the port district or within a municipality in the New Jersey portion of the port district which qualified for state aid under the provisions of P.L., 1971, C.64 as most recently supplemented by P.L., 1978, C.14 or which may hereafter qualify for such aid, including, but not limited to, machinery, equipment and other facilities deemed necessary or desirable in connection therewith, or incidental thereto, whether or not now in existence or under construction, which shall be considered suitable by the port authority for manufacturing, research, non-retail commercial or industrial purposes within an industrial park, or for purposes of warehousing or consumer and supporting services directly related to any of the foregoing or to any other port authority project or facility; and which may also include or be an industrial pollution control facility or a resource recovery facility, provided that no such industrial development project or facility may include or be a facility used for the storage

of chemicals, fuel or liquified natural gas unless incidental to the effectuation of such industrial development project or facility;

* * *

N.Y. Unconsol. L. §7201; N.J.S.A. §32:2-23.27

Legislative findings and determinations

The states of New York and New Jersey hereby find and determine that:

(1) the efficient, economical and convenient mass transportation of persons to, from and within the port of New York district as defined in the compact between the two states dated April thirtieth, nineteen hundred twenty-one (hereinafter called the "port district") is vital and essential to the preservation and economic well being of the northern New Jersey-New York metropolitan area;

(2) in order to deter the economic deterioration of the northern New Jersey-New York metropolitan area adequate facilities for the mass transportation of persons must be provided and buses are and will remain of extreme importance in such transportation;

(3) the provision of mass transportation including bus transportation in urban areas has become financially burdensome and may result in the additional curtailment of significant portions of this essential public service;

(4) the economic viability of the existing facilities operated by the port authority of New York and New Jersey (hereinafter called the "port authority") is dependent upon the effective and efficient functioning of the transportation network of the northern New Jersey-New York metropolitan area and access to and proper utilization of such port authority facilities would be adversely affected if users of bus transportation were to find such transportation unavailable or significantly curtailed;

(5) buses serving regional bus routes and feeder bus routes and ancillary bus facilities constitute an essential part of the mass commuter facilities of the port district;

(6) the continued availability of bus transportation requires substantial replacement of and additions to the number of buses presently in use in the northern New Jersey-New York metropolitan area;

(7) the port authority which was created by agreement of the two states as their joint agent for the development of transportation and terminal facilities and other facilities of commerce of the port district and for the promotion and protection of the commerce of their port, is a proper agency to provide such buses to each of the two states and such provision of buses by the port authority is in the interest of the continued viability of the facilities of the port authority, and is in the public interest;

(8) the operation of the facilities of the port authority, including but not limited to the port authority bus terminal at forty-first street and eighth avenue in New York county in the city and state of New York and the extension thereto currently under construction (hereinafter called the "bus terminal"), the George Washington bridge bus station and the provision of buses and ancillary bus facilities pursuant to this act involve the exercise of public and essential governmental functions which must be performed by the two states or any municipality, public authority, agency, or commission of either or both states;

(9) the revision to the port authority bridge and tunnel toll schedules which was effective May fifth, nineteen hundred seventy-five, is expected to result in additional revenues to the port authority sufficient to support the financing with consolidated bonds of the port authority of approximately four hundred million dollars for passenger mass transportation capital projects (hereinafter called "passenger facilities"), approximately one hundred sixty million dollars thereof being allocated to the extension to the bus terminal, with the remaining two hundred forty million dollars to be allocated on the basis of one hundred twenty million dollars in each state for passenger facilities, including but not limited to the acquisition, development and financing of buses and related facilities, as determined by each such state and the port authority acting pursuant to legislative authorization and commitments to the holders of port authority obligations; and

(10) the port authority's function as a regional agency of the two states makes it appropriate that line-haul regional bus route passenger facilities be equipped pursuant to this act with buses and ancillary bus facilities and that the need for development of such routes be satisfied on a priority basis.

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N.Y. Unconsol. L. §7202; N.J.S.A. 32:2-23.28

Definitions

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(10) "regional bus area" shall mean that area in the states of New York and New Jersey which lies within a radius of seventy-five miles of the bus terminal.

N.J.S.A. 32:2-5

Removal

Any commissioners of the port authority from this state may be removed upon charges and after a hearing by the senate.

Chapter 422, Laws of New York, 1930

Removal

Any commissioners of The Port of New York Authority from the state of New York may be removed upon charges and after a hearing by the governor.

Supreme Court, U.S.
FILED
JUL 22 1994
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(8)

No. 93-1197

In The

Supreme Court of the United States

October Term, 1994

ALBERT HESS,

Petitioner,

- against -

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

- against -

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

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ARGUMENT IN REPLY

I. BECAUSE THE CONSTITUTIONAL PRESUMPTION IS THAT INTERSTATE COMPACT ENTITIES DO NOT HAVE ELEVENTH AMENDMENT IMMUNITY ABSENT A CLEAR STATEMENT BY THE STATE PARTIES IN THE COMPACT INSTRUMENT, AS DELIBERATELY CONSENTED TO BY CONGRESS, AND BECAUSE THE COMPACT INSTRUMENT HERE REVEALS THAT PORT AUTHORITY/PATH WAS INTENDED BY THE STATES AND CONGRESS TO BE AKIN TO A POLITICAL SUBDIVISION THAT DOES NOT HAVE ELEVENTH AMENDMENT IMMUNITY, THE PORT AUTHORITY IS AMENABLE TO SUIT IN FEDERAL COURT.

It bears repeating that the narrow question presented by this Petition, as articulated by the Court itself in its Order granting certiorari, 114 S.Ct. 1292, is whether the Port Authority of New York and New Jersey (and its subsidiary, PATH) has immunity from suit in federal court under the Eleventh Amendment. It also bears repeating that these cases do not involve an entity created by a single state. The Port Authority is a bi-state entity created by an interstate compact, sanctioned under Article I, Section 10, Clause 3, of the Constitution. Petitioners submit that this Court's decision need only focus on the particular character of the Port Authority/PATH as an interstate compact entity, and that such an approach is perfectly consistent with the wider body of this Court's Eleventh Amendment jurisprudence as reflected in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440

U.S. 391 (1979). No new or expanded Eleventh Amendment doctrines need to be created for the resolution of this case.

A. A Textual Examination Of The Compact Creating The Port Authority Reveals No Intent To Endow It With Eleventh Amendment Immunity, And In Fact Evidences An Intent To Create An Entity Akin To A Political Subdivision That Has No Eleventh Amendment Immunity. Subsequent State Pronouncements And Judicial Decisions Cannot Modify The Compact Instrument.

Petitioners have already explained how a fair reading of the Compact creating the Port Authority/PATH is highly suggestive of the conclusion that the state parties and the consenting Congress intended that the Port Authority/PATH be considered an entity akin to a political subdivision which does not possess Eleventh Amendment immunity. Similarly, nothing in the Compact instrument reveals any intent by the compacting states or Congress to grant the entity immunity in federal courts.

As noted in our opening Brief, the Compact between New York and New Jersey calls the Port Authority/PATH, a "body corporate and politic." This Court has recognized that this term refers to a local government or municipal corporation and not to a state. Decisions of the state courts of New York and New Jersey, contemporary with the drafting of the Compact, also demonstrate that the compacting states recognized that the legal terms-of-art used in the Compact applied to local governments and municipal entities and not to states. An examination

of the Eleventh Amendment and its history also leads to the conclusion that "bodies corporate and politic" were not intended to be afforded Eleventh Amendment protection. A review of the legislative history of Congress' consent to the Compact also reveals the understanding by Congress that the entity was not to be afforded protection from suit in federal courts. Consistent with these numerous sources is the Port Authority/PATH's own statement, contained in its legally mandated Comprehensive Report (Pet. for Cert. App. 59a), that it is a political subdivision. This textual evidence is bolstered by the fiscal structure of the Port Authority/PATH and its autonomous nature. *Pet. Br.* 17-26.[1]

Nowhere does Respondent seriously dispute these characterizations. Nor does it deny that, at best, the Compact is silent as to the matter of the Authority's Eleventh Amendment immunity. Respondent relies instead on a

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[1] PATH's self-characterization as a "political subdivision" is contained in its Comprehensive Financial Reports. *See, e.g.*, Report for the Years Ending December 31, 1991 (Pet. for Cert. App. 59a) and December 31, 1992 (*Br. Pet.* at n.2). It is interesting that PATH knew the significance of its status as either a state-entity or a political subdivision at least as early as 1989, when the Second Circuit Court of Appeals rendered its decision in *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd, Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299 (1990). That decision recognized that the threshold question before it, in determining whether PATH was entitled to Eleventh Amendment immunity, was whether PATH was more akin to a state or to a political subdivision. *Id.* at 873 F.2d 630. Despite its knowledge of the significance of the language used to describe the Port Authority/PATH, it continued to describe itself using language that rendered it unable to invoke the Eleventh Amendment.

number of state law decisions characterizing the Port Authority/PATH as a state instrumentality. It also impliedly depends on the favorable representations made by the States of New York and New Jersey in this litigation. In short, Respondent hangs its argument on interpretations of the Compact made by the state parties well after it was adopted. These post-Compact statements of intent and application, even if well-reasoned and not self-serving, see *supra* at n.1, can have no bearing on the matter at hand absent some indication that the States intended and Congress had formally consented to the grant of Eleventh Amendment immunity at the time the Compact was considered. Eleventh Amendment immunity must be bestowed by the states and Congress in the compact; it is insufficient that the compacting states later decide to grant such immunity or that state courts act under a fiction that it was in fact originally bestowed.

B. There Is No Presumption Of Eleventh Amendment Immunity For Interstate Compact Entities, And States Cannot Implicitly Endow Interstate Compact Entities With Eleventh Amendment Immunity Because The Compact Clause Represents, As Part Of The "Plan of the Convention," A Derogation Of State Sovereignty.

One thrust of Respondent's (and its amici's) arguments is that, contrary to this Court's holding in *Lake Country*, 440 U.S. at 401, interstate compact entities are assumed to possess Eleventh Amendment immunity. They argue that this assumption negates the need for the finding of specific intent to confer Eleventh Amendment immunity in the compact instrument. *Amicus Br. of Council of State Gov'ts*, at 12-18. Petitioners submit that this

argument represents a gross distortion of this Court's Compact Clause jurisprudence and is potentially destructive of the delicate balance of federalism that Respondent so fervently invokes. Once the error of Respondent's argument becomes apparent, it follows that absent a clear statement of original intent by the compacting parties and by Congress concerning the Eleventh Amendment immunity of a bi-state entity, it should be presumed not to have such immunity. The Port Authority (and thus its subsidiary, PATH) does not have, and never has had, any immunity from suit in federal court.

Respondent begins with a well-accepted point: the Eleventh Amendment is a broad vindication of state sovereignty, and the Amendment itself sets forth a doctrine that had been accepted when the Constitution was adopted. Petitioners have no difficulty with these propositions. But, Respondent goes on to suggest that the Amendment was intended to prevent any federal judicial interference with state government. Because, Respondent reasons, bi-state entities are creatures of state government (having been created by states) they are likewise presumptively immune from suit in federal court.

Respondent's contention has a fatal constitutional flaw. Bi-state entities are not entitled to a presumption of Eleventh Amendment immunity because they are *not* the creatures of the compacting States. They are possible only by virtue of the federal Constitution and the consent of the federal Congress. As has been repeatedly noted in the decisions of this Court, under the Compact Clause, the states of the Union gave up their sovereign right and power to conclude agreements amongst themselves,

agreements that could create legal effects and consequences extending not only within the sovereignty of the effected states, but also beyond to neighboring states and into the realm of federal legislation and power. *See, e.g., New Hampshire v. Maine*, 426 U.S. 363, 369 (1976) (particular concern of the Compact Clause was to condition congressional consent for those agreements "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.") (quoting *Comm. of Virginia v. State of Tennessee*, 148 U.S. 503, 519 (1893)); *Poole v. Fleeger's Lessee*, 36 U.S. (11 Pet.) 185, 209-10 (1837); *Wilson v. Mason*, 5 U.S. (1 Cranch) 45, 92 (1801) (where Chief Justice Marshall raised the concern that, absent the Compact Clause, "two states might, by agreement between themselves, annul the Constitution of the United States."). *See also* 2 Joseph Story, *Commentaries on the Constitution of the United States*, § 1403, at 264 (T. Cooley ed. 1873) (Compact Clause drafted "in order to check any infringement of the rights of the national government.").

In requiring states to obtain congressional consent to any compacts, the Compact Clause implicitly acknowledges both the unique position of such compacts in the federalist structure and the supreme sovereignty of the federal government. In fact, this Court has noted that congressional consent was required by the Framers "to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Cuyler v. Adams*, 449 U.S. 433, 440 (1981). "A compact entered is an obligation which, as

long as it exists, diminishes the freedom of the state to act independently in a particular sphere of interest . . . . " Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* 298 (1971).

It is undoubted that the Compact Clause represents a relinquishment of state power as part of the "plan of the Convention." *See Edelman v. Jordan*, 415 U.S. 651, 661 n.9 (1974); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 310 (1990) (Brennan, J., joined by Marshall, J., Blackmun, J., and Stevens, J., concurring in part and concurring in the judgment); and cases cited at *Pet. Br.* 14. The very text of the Constitution notes the primary concern that Congress must consent to agreements coming within the scope of the Compact Clause. But, more than that, one state party to a compact relinquishes sovereignty to its partners. After all, one state cannot (in the case of a compact creating an entity or authority) change or subvert the purposes or functions of the institution without the consent of the other compact parties. One state cannot pursue its sovereign goals through a bi-state agency without the permission of the other. *See Olin v. Kitzmiller*, 259 U.S. 260, 263 (1922); cf. *Henderson v. Delaware River Joint Toll Bridge Commission*, 362 Pa. 475, 487-88, 66 A.2d 843, 849-50, *cert. denied*, 338 U.S. 850 (1949).

Lastly, it is now indisputed that interstate compacts are federal, not state, law. *See Cuyler v. Adams*, 449 U.S. at 439 n.7; *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851) ("This compact, by the sanction of Congress, has become the law of the Union."). The interpretation of interstate compacts present federal questions. *See Delaware River Joint Toll Bridge Commission of Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419, 427-28

(1940). They are to be construed as federal statutes, using principles of statutory interpretation as necessary, although state law may be relevant (as here concerning the meaning of the Compact's designation and characterization of the Port Authority as a "body corporate and politic") for a court to better understand the words and terms used in the compact instrument. To the extent that this Court has federalized the interpretation of multi-state compacts, it recognizes a further derogation of state sovereignty under the Compact Clause.

Since states creating compact entities do not possess their full sovereignty in these vital respects, they cannot implicitly endow the created entity with Eleventh Amendment immunity, a signal attribute of their own constitutional sovereignty. To argue, therefore, that bi-state entities are automatically endowed with an essential attribute of state sovereignty – Eleventh Amendment immunity – is to argue without a constitutional foundation.

C. Maintenance Of The Delicate Federal Balance Requires That Compacting States Specifically Endow, And Congress Explicitly Concur With, A Bi-State Entity's Eleventh Amendment Immunity At The Time The Compact Is Created And Congressional Consent Is Given.

The better-reasoned position must be that interstate compact entities are not presumed to possess Eleventh Amendment immunity, but that it is within the power of the compacting states to grant immunity from suit in federal courts to bi-state agencies. This must be done explicitly and with the express consent of Congress; it

must appear on the face on the compact instrument that is approved by Congress.

The wisdom of this position is revealed by noting a dispute not directly implicated in this case: whether Congress truly has the power to amend or revise an interstate compact once it has given its consent, or otherwise to regulate the activities of interstate compact entities. Although some authorities suggest that technical amendments to compacts need not be referred back to Congress for approval, *see, e.g., Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 391, 190 N.E.2d 402, 406, 240 N.Y.2d 1, 7 (1963); *Henderson*, 362 Pa. at 484-85, 66 A.2d at 848, the question whether Congress may affirmatively seek to subsequently modify a compact has yet to be settled.

The stated position of the Port Authority/PATH is, however, that once Congress adopted its Compact in 1921 and 1922, the Authority was then free to enlarge or change the scope of its activities without the need for any subsequent congressional concurrence. Indeed, Respondent has asserted that Congress is simply powerless to interfere in its activities. *See United States v. Tobin*, 195 F. Supp. 588, 595 (D.D.C. 1961), *rev'd*, 306 F.2d 270 (D.C. Cir. 1962), *cert. denied*, 371 U.S. 902 (1962); Inquiry Before Subcommittee No. 5 of the House Committee on the Judiciary on the Return of Subpoenas, Port of New York Authority, 86th Cong., 2d Sess., ser. 20, at 16-19 (1960). As of the time of the Tobin litigation, in which the Executive Director of the Port Authority defied a congressional subpoena pursuant to an investigation of the Authority's activities, the Authority had purported to make twenty-six augmentations to its powers without seeking consent

by Congress. *See* Brief of Appellant at 6, *Tobin v. United States*, 306 F.2d 270 (D.C. Cir. 1962) (No. 16604), *cert. denied*, 371 U.S. 902 (1962). See also Emanuel Celler, Congress, Compacts, and Interstate Authorities, 26 *Law & Contemp. Probs.* 682 (1961); Note, Congressional Supervision of Interstate Compacts, 75 *Yale L.J.* 1416, 1427 n.66 (1966).

Compacts which create bi-state or multi-state agencies pose a special challenge to the underlying premise of the Compact Clause. These entities have proliferated in this century, the New York Port Authority being just the first of them. Such authorities are organic entities, capable of change and growth. This is as it should be. The problem arises when, precisely as here, an interstate compact agency purports to arrogate powers without subsequent congressional consent. In this case it is the claim of the Port Authority/PATH to Eleventh Amendment immunity. The rule must be that Congress must specifically approve such a grant of immunity so that the Eleventh Amendment, a constitutional grant of immunity to a narrowly defined class of defendants, is not inappropriately extended.

Petitioners are not suggesting that all subsequent modifications and augmentations of the powers of interstate compact entities be ratified by Congress. Such a result would be unnecessary. But when the states wish to create an interstate compact agency, and to endow it with their Eleventh Amendment immunity, it is incumbent upon them to make their intent clear via a plain statement to that effect in the compact instrument, and to secure congressional consent to such a grant. As for compact entities already in existence, all the states need do

(assuming they, in fact, desired the relevant entity to have Eleventh Amendment immunity) is to seek congressional consent for an amendment to the compact, reflecting such a desire.[2]

In the case of the Port Authority/PATH, no original intent to confer Eleventh Amendment immunity is contained in the Compact instrument nor has this intent been declared by a congressionally approved amendment to the Compact. In fact, the language of the Compact reflects that the states and Congress intended that the Port Authority/PATH be considered akin to a political subdivision and that it not have Eleventh Amendment immunity. *Br. Pet.* at 13-27.

II. PATH CANNOT INVOKE THE PROTECTION OF THE ELEVENTH AMENDMENT BECAUSE A JUDGMENT AGAINST PATH WILL NOT HAVE ESSENTIALLY THE SAME PRACTICAL CONSEQUENCES AS A JUDGMENT AGAINST EITHER NEW YORK OR NEW JERSEY.

The Port Authority/PATH cannot invoke the Eleventh Amendment's protection because the language contained in its Compact evidences the clear intention of the

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[2] The Respondent (and its amici) have argued that the absence of Eleventh Amendment immunity will stifle their use of such bi-state entities as "social laboratories" and will limit their use of such entities in their attempts to find "innovative" revenue-raising tools. Neither argument is valid. No state policy will be thwarted as long as the states and Congress explicitly set forth, in the compact (or an amendment thereto if an existing entity), their intention to confer Eleventh Amendment immunity on said entity.

States of New York and New Jersey, as well as Congress, that it be treated as a political subdivision or municipality and not a State. While the fiscal structure of the Port Authority/PATH need not be analyzed because of the overwhelming textual evidence, it does provide further support for the conclusion that the Port Authority/PATH is not entitled to Eleventh Amendment immunity. The Port Authority/PATH is financially self-sustaining and its debts cannot become the liability of either compacting state. *Pet. Br.* at 34-38.

A. The "Impact On State Treasury Test" Is The Appropriate Analysis To Be Used If The Compact Language Does Not Clearly Reflect The Intentions Of The States And Congress.

If this Court believes that the Compact is not sufficient to ascertain Congress' and the states' intention, then the Court should apply the "impact on state treasury test." That test will also lead to the conclusion that the Port Authority/PATH is not entitled to Eleventh Amendment immunity.

The test, as re-stated in *Lake Country*, 440 U.S. at 400-01, is that "some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same consequences as a judgment against the State itself." [citing at 440 U.S. at n.15, *Edelman*, 415 U.S. 651 (1974) and *Ford Motor Co. v. Dept. of Treasury of State of Indiana*, 323 U.S. 459 (1945).]

Respondent suggests that this test is inappropriate. Their criticism is unfounded. First, this test is true to the

historical purpose of the Eleventh Amendment which was to insulate the treasuries of the new States from financial ruin by protecting them from suits to collect debts arising during the Revolutionary War. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, n.1 (1959); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 151 (1984). Second, it recognizes and respects that the power to tax, and thus accumulate a treasury for the use of its citizens, is basic to a state's sovereignty. *Bode v. Barrett*, 344 U.S. 583, 585 (1953). This test safeguards against federal interference with that important attribute of state sovereignty. Finally, this is an objective test. It permits the lower courts to determine whether a judgment against an entity, is essentially a judgment against a state, by an examination of several objective factors. *Edelman*, 415 U.S. at 663. These include the presence of statutory language protecting the state from judgments against the entity, the ability of the entity to raise its own funds and be self-sustaining, whether by statute a state is obligated to appropriate funds to the entity, and whether insurance is available to pay a money judgment. By providing the lower courts with an objective test their task is made easier. An objective test is especially important when examining a Compact Clause entity. Bi-state or multi-state entities are subject to judicial review in more than one state, and an objective standard will reduce the likelihood of conflicting decisions by the lower courts.

Respondent (and its amici) suggest that an alternative approach, concerning indicia of state control over an entity, should be used to determine Eleventh Amendment status. This approach looks at the political environment and interaction between the states and the entity and tries

to ascertain whether the entity is autonomous or subject to state control. It also requires the lower courts to examine the political processes of the states with all of its subtleties and it requires an examination of the political interplay between the Governors and legislatures of the states and the commissioners and other employees of the agency. This analysis invites confusion and inconsistent lower court decisions as the courts are forced to evaluate subjective factors; it provides no certainty, especially when multi-state entities are involved.

Respondent also directs certain other criticisms against the "impact on state treasury test" that are without merit and which we will briefly address. They have argued that the Port Authority's money is actually the states' money. In effect, they argue that the Port Authority is an alternative depository for state funds or a branch of the state treasury. This cannot be accurate as neither state, independently, can control those funds. Neither New York nor New Jersey can unilaterally use Port Authority funds for a general state purpose. If one of the states had a budget shortfall it could not, on its own, use Port Authority funds to make up the shortage. In reality, the Port Authority/PATH's money is its own and not available for use by a single sovereign state.

Respondent has also argued that a judgment against PATH could impact the state treasuries because, if the Port Authority/PATH does not have sufficient funds, the states may have to provide financial assistance and that will take funds away from other state projects. This is also a fallacious argument. The Port Authority/PATH is self-funding through user charges, rents, fees, tolls, etc.

Pet. Br. at 34-35, citing *Port Authority Comprehensive Financial Report* (Pet. for Cert. App. 59a-63a). Thus, state funds are not necessary to respond to a money judgment against the Port Authority/PATH. Further, Respondent's argument that an entity is entitled to Eleventh Amendment protection if a state appropriation to it results in a reduction of state funds for other projects, is overly broad. It applies to almost any entity, public or private. States appropriate funds to local governments and to help defray the cost of local government projects. If a judgment is entered against a city or a town the state might feel compelled to appropriate more funds to it, thus reducing money available to other state projects. Under the Respondent's argument this result renders the city or town protected by the Eleventh Amendment. But, this Court has "consistently refused to construe the Amendment to afford protection to political subdivisions, such as counties and municipalities . . . " *Lake Country*, 440 U.S. at 401. The Respondent's argument has even more absurd implications. It is possible that a private organization, such as a hospital or college, could suffer dire financial consequences as a result of a money judgment. If that institution, although private, was important to the citizens, a state might decide to provide financial assistance to it. This would make less money available for other state projects. Under Respondent's argument these private entities would be afforded Eleventh Amendment immunity. That result would be invalid on its face.

We argued in our opening Brief that any payments to the Port Authority/PATH, by either New York or New Jersey, were voluntary and, therefore, did not invoke Eleventh

Amendment protection. Neither state is required to appropriate funds to the Port Authority/PATH. No state appropriation to the Port Authority/PATH can be made unless first approved by the Governors of both New York and New Jersey, neither of whom are required to approve such appropriation. *Pet. Br.* at 37. PATH has commented, "How requiring the consent of the highest elected State official to such an appropriation . . . negates State agency status is something of a mystery." *Resp. Br.* at 33, n.16. The requirement that the Governor approve an appropriation to PATH does not make it a state alter ego any more than does the need for gubernatorial approval of appropriations to local governments make them state alter egos for Eleventh Amendment purposes. *See Karcher v. Kean*, 479 A.2d 403 (N.J. 1984) and *County of Oneida v. Berle*, 49 N.Y.2d 515, 404 N.E.2d 133, 427 N.Y.S.2d 407 (N.Y. 1980) (Governor has the right to approve or veto state appropriations, including those to municipal governments).

B. The "Impact On State Treasury Test" Is The Appropriate Analysis To Be Used Because The Effect Of The Proceedings In These Cases Is To Recover Money Damages.

Because of the reasons set forth in the preceding section, the "state control" approach should not be used as it relies on subjective factors that can lead to inconsistent results where multi-state entities are involved. Should this Court find that the "state control" approach does have a role in Eleventh Amendment jurisprudence,

it should still not be used in these cases.[3] Instead, the "impact on state treasury test" remains the appropriate test because of the nature of the relief sought.

Many lower courts have decided Eleventh Amendment cases by examining the entity itself. To do so, some courts have utilized the state treasury test, others have used the state control approach, and most have utilized a combination of the two. This haphazard approach to analysis is based on a fundamental misunderstanding of the Eleventh Amendment methodology mandated by this Court.

This Court's decisions demonstrate that a two-step analysis is necessary when determining whether an entity is entitled to a state's Eleventh Amendment immunity. This two-step analysis is only necessary where the instrument establishing the entity, in this case the bi-state Compact, does not disclose the intention of the states or Congress.

Step one requires the lower court to determine whether the consequences of a federal court judgment will primarily result in money damages or injunctive relief. This Court's decisions focus on the nature and effect of the requested judgment, and not simply on the entity. In *Ford Motor*, 323 U.S. at 464, the Court held,

> " . . . the nature of the suit as one against the state is *to be determined by the essential nature and*

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[3] Although an inappropriate standard in these cases, the "state control" approach reveals that the Port Authority/PATH is significantly autonomous from the compacting states and has historically been politically adverse to them. *Pet. Br.* at 27-30.

effect of the proceeding. And when the action is in essence one for the recovery of money from the state, the state is the real substantial party in interest and is entitled to invoke its sovereign immunity . . . " (emphasis added).

In *Pennhurst*, 465 U.S. at 101, n.11, the Court said,

"The general rule is that a suit against the sovereign if '*the judgment sought would* expend itself on the public treasury or domain, or interfere with the public administration,' or if the *effect of the judgment* would be 'to restrain the Government from acting or compelling it to act.'" (citing *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted)) (emphasis added).

Only after the nature and effect of the proceedings is determined does the court proceed to the second step where it analyzes the agency and its relationship with the state. The analysis should be consistent with the effect of the judgment. If a money judgment is sought the relevant inquiry is whether the judgment against the entity will "have essentially the same consequences as a judgment against the State itself." *Lake Country*, 440 U.S. at 401. Only the "impact on state treasury" factors are relevant and necessary to this determination. On the other hand, if an injunction is sought to force the entity to act or stop acting in a certain way, the relevant inquiry is how the judgment will interfere with public administration. The "state control" factors are relevant to this determination because, if an entity is compelled to do or not to do something, the impact on the state will depend on whether the entity's actions are actually its own or whether the political process causes the state to so closely

control its conduct that the entity's actions are actually those of the state.

In these cases only a money judgment is sought. Accordingly, under this two-step analysis the "state control" approach is not relevant. Under "the impact on state treasury test" the Port Authority/PATH is not entitled to Eleventh Amendment protection as a judgment against PATH will not be paid from any state treasury. *See Pet. Br.* at 34-38.[4]

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[4] In an unrelated argument, The Council of State Governments asserts that PATH's Consent to Suit provision, N.J.S.A. § 7101 (Pet. for Cert. App. 57a) would "have been unnecessary if the respective States had not intended to confer sovereign immunity on their creature." *Amicus Br. of Council of State Governments* at 18-19. Whether the Port Authority/PATH possessed general sovereign immunity is a different question than whether it was a state entity entitled to invoke Eleventh Amendment immunity. Local municipal entities also possess sovereign immunity, and consent is required before suing them, but they cannot invoke the Eleventh Amendment. *See, e.g.*, N.J.S.A. § 59:1-1 *et seq.* (New Jersey Tort Immunity Act that codifies and modifies the "traditional doctrine of sovereign immunity," § 59:1-2, and applies it to any "public entity" that includes "the State, and any county, municipality, district, public authority, public agency, and any other political subdivision or public body in the State." § 59:1-3).

CONCLUSION

For the reasons set forth in our opening Brief, and in this Reply Brief, it is respectfully requested that the decision of the United States Court of Appeal for the Third Circuit in *Hess and Walsh* be reversed and remanded for further proceedings.

Respectfully submitted,

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OCTOBER TERM, 1993

ALBERT HESS,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

CHARLES F. WALSH,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1197

ALBERT HESS,

Petitioner,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

v.

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF THE RAILWAY LABOR EXECUTIVES' ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Railway Labor Executives' Association ("RLEA") is an unincorporated association comprised of the chief executive officers of the following labor organizations: American Train Dispatchers (Dept. of BLE); Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employes; Brotherhood of Railroad Signalmen; Hotel and Restaurant Employees International

Union; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; and Sheet Metal Workers International Association. These organizations represent a large portion of unionized railroad employees in the United States, as well as on the Port Authority Trans-Hudson Corporation ("PATH").

All of these organizations' members who work for railroads are protected by the Federal Employers' Liability Act, 45 U.S.C. §§51 *et seq.* ("FELA") as well as by the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). Thus, whether or not PATH is protected by the Eleventh Amendment is important to all PATH employees and their labor representatives. More particularly, the labor organizations are keenly interested in assuring that PATH employees who may reside in New Jersey and prefer to bring an action in a district court in their home state, are entitled to the same statute of limitations as their counterparts who live in New York and prefer to bring an action in a district court in their home state. In short, as representatives of PATH employees, the members of the RLEA are acutely concerned about the disparate treatment that occurs among employees when there is a lack of uniformity in the application of the law as it applies to employees of the same employer. Moreover, the Court's analysis of whether PATH is protected by the Eleventh Amendment will be important in providing the framework for determining if railroads run by other state-created entities are immune from suit under FELA and the RLA. Accordingly, RLEA respectfully submits this brief as *amicus curiae* in support of Petitioners.[1]

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[1] This brief is presented with the permission of the parties pursuant to Rule 37.3 of the rules of this Court.

SUMMARY OF ARGUMENT

The protection provided by the Eleventh Amendment to "one of the United States" applies to an entity other than a state only if the entity is found to be an arm of the state. Given that the underlying purpose for the Eleventh Amendment was to protect the states from claims against their treasuries, the rule that has evolved is that the Eleventh Amendment protects a state-created entity from suit by private parties if a liability judgment must be paid from the state treasury. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Conversely, if the judgment against the state-created entity does not result in a judgment against the state, then the "purpose of the immunity . . . largely disappears." *Jacintoport Corp. v. Gr. Baton Rouge Port Comm'n*, 762 F.2d 435, 440 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986).

In determining whether an entity is an arm of the state, a number of the courts of appeals have focused on the purpose underlying the Eleventh Amendment to conclude that the most important factor in determining whether a state-created entity is entitled to Eleventh Amendment protection is whether the state is legally liable for judgments against the state-created entity. Following this Court's analysis in *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979), the courts of appeals also have examined a number of other factors, including (1) how state law characterizes the entity; (2) whether the entity has the power to sue and be sued; (3) whether the entity may enter into contracts in its name; (4) whether the entity has the authority to hold and use property; (5) whether the entity's property is subject to taxation; (6) whether the entity has the power of eminent domain; and (7) whether the state has resorted to a law suit in an attempt to enforce its will upon the agency.

When the factors are applied to the Port Authority of New York and New Jersey ("Port Authority") and its subsidiary, PATH,[2] it is abundantly clear that the Port

Authority and PATH are not arms of the state. The critical and most important factor in determining immunity—whether the state treasuries will be liable for any judgment rendered against PATH—weighs heavily against finding that PATH is immune to suit under the Eleventh Amendment. Significantly, PATH is prohibited from pledging the credit of the state or imposing any obligation on the state. Moreover, the states gave the Port Authority the full authority to issue bonds in order to raise revenues. Only one provision in the "Compact Between New York and New Jersey Creating Port Authority of New York and New Jersey" (N.Y. UNCONSOL. LAW §§ 6401-6423 (McKinney 1979)) [hereinafter referred to as Bi-State Compact] pertains to the appropriation of funds to the Port Authority and PATH. That provision provides that the state legislatures shall appropriate up to $100,000 annually to assist with administrative expenses; however, any appropriation must be approved by the governors of both states. Thus, the liability is subject to three limitations: it must be for administrative expenses, it must not exceed $100,000, and it must be approved by the states' governors. In short, any payment for judgments against PATH would be purely discretionary. The fact that a state might voluntarily agree to pay a judgment is not a basis for according an entity Eleventh Amendment immu-

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[2] PATH, a wholly owned subsidiary of the Port Authority, operates a passenger railroad between the states of New York and New Jersey within the Port District, which is a 1,500 square mile area in the New York Harbor area. PATH is entitled to " 'all of the privileges, immunities, tax exemptions and other immunities of the port authority' and is subject to suit to the same extent as the Authority." *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 301 (1990) (*"Feeney"*), *quoting and citing* NJ Stat Ann § 32:1-35.61 (West 1963); N.Y. UNCONSOL. LAW § 6612 (McKinney 1979). PATH, therefore, is subject to Eleventh Amendment protection to the same extent as the Port Authority; accordingly, unless otherwise noted, the attributes of the Port Authoriy will also be presumed to be attributes of PATH and the two entities will be used interchangeably throughout this brief.

nity. Furthermore, the payment of $100,000 is clearly not the level of financial commitment that the courts have found constitutes a basis for finding immunity.

Moreover, the facts in this case show that the states created the Port Authority with the intention that it would be financially self-sustaining, and since approximately 1934 it has achieved that goal. Indeed, in 1991 the Port Authority reported that its revenues exceeded expenses by $519,489.00 and that it earned approximately $74.8 million on its investments. In short, it is exceedingly unlikely that the states would ever be called upon to voluntarily contribute to any judgment against the Port Authority or PATH.

The remaining factors also militate against finding immunity for PATH. The states and the Port Authority refer variously to the Port Authority and, derivatively, to PATH as a body corporate and politic, a municipal instrumentality, and a political subdivision. All of these terms suggest that the states did not intend for PATH to be an arm of the state. In addition, the factors showing the extent of autonomy that PATH exercises also weigh in favor of a finding that PATH is not entitled to Eleventh Amendment protection. Thus, although there is some oversight of PATH in that the Board of Commissioners of the Port Authority and PATH are appointed by the states, the Board is required to submit an annual report to the states, and its decisions are subject to the veto of either governor, it is clear that the states have imbued the Port Authority and PATH with many attributes of autonomy that are not associated with an alter ego of the state. Thus, in order to perform the many responsibilities associated with planning, developing, and operating transportation facilities, as broadly defined in the Bi-State Compact, the Port Authority, and, derivatively, PATH have full power and authority with respect to tolls, fares, fees and other charges. In addition, PATH has full power and authority to purchase, lease and sell real property; to enter into contracts; and to sue and be sued.

Where, as here, the Bi-State Compact and other enabling legislation indicates that the states created an agency comparable to a political subdivision, immunity should not be granted for, as the Court stated in *Lake County Estates*, 440 U.S. at 401:

> Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

An analysis of the attributes of PATH provides no good reason for believing that the states intended to confer Eleventh Amendment immunity upon PATH.

ARGUMENT

I. THE PURPOSE FOR WHICH THE ELEVENTH AMENDMENT WAS CREATED—TO MINIMIZE FEDERAL ADJUDICATION THAT WOULD INVADE THE STATE TREASURIES WITHOUT THEIR CONSENT—WEIGHS AGAINST APPLYING IMMUNITY TO PATH BECAUSE A JUDGMENT AGAINST PATH WOULD NOT SUBJECT THE STATES TO INVOLUNTARY LIABILITY

A. The Purpose Underlying The Eleventh Amendment Provides The Framework For Analyzing Whether A State-Created Entity Is An Arm Of The State And Entitled To Eleventh Amendment Protection

The factual basis leading to the adoption of the Eleventh Amendment underscores the very purpose for which the Eleventh Amendment was created. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 1 L.Ed. 440 (1793) the Supreme Court held that federal courts had jurisdiction to hear a claim by two South Carolina citizens, on behalf of a British creditor, against the State of Georgia. An outcry arose from the states for they were not only concerned that this holding would threaten the dignity of the states but also that it would subject them to unlimited liability to creditors' claims. *Edelman v. Jordan*, 415 U.S. 651, 662 (1974); *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 276 n.1 (1959); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 97-98 (1984). Congress passed the Eleventh Amendment in direct response to the *Chisholm* decision. *Id.*

The Eleventh Amendment states:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The immunity granted in the Eleventh Amendment is limited by its terms to "one of the United States." *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391, 400 (1979). This Court has, however, held that immunity applies even though the party being sued is not "one of the United States" if (1) "the entity being sued is so intricately intertwined with the State that it can best be understood as an 'arm of the State' "; or (2) if "the State, though not a nominal party, is the real party in interest." *Port Auth. Trans-Hudson v. Feeney*, 495 U.S. 299, 311-312 (1990) (Brennan, J., concurring).

The Court consistently has denied Eleventh Amendment immunity "to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.' " *Lake Country Estates*, 440 U.S. at 401. Entities that do exercise state power "have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Id.* at 400-401. Thus, the rule that has evolved from the passage of the Eleventh Amendment is "that a suit by private parties seeking to impose a liability which must be paid from public funds in the

state treasury is barred by the Eleventh Amendment." *Edelman v. Jordan*, 415 U.S. at 663, *citing Great N. Life Insurance Co. v. Read*, 322 U.S. 47 (1944); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946).

The Courts of Appeals have, in turn, consistently held that the extent to which the state is responsible for funding the entity, together with its legal liability for judgments against the entity, is the most important factor in determining whether an entity is protected by the Eleventh Amendment as an arm of the state. *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 939 (1st Cir. 1993); *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 815 (3d Cir. 1991) (*en banc*), *cert. denied*, 112 S. Ct. 2281 (1992);[3] *Durning v. Citibank*, 950 F.2d 1419, 1424 (9th Cir. 1991); *Feeney v. Port Auth. Trans-Hudson Corp.*, 873 F.2d 628, 631 (2d Cir. 1989), *aff'd on other grounds*, 495 U.S. 299 (1990); *Morris v. Washington Metropolitan Area Transit Auth.*, 781 F.2d 218, 227 (D.C. Cir. 1986); *Jacintoport Corp. v. Gr. Baton Rouge Port Comm'n*, 762 F.2d 435, 441 (5th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986). When an examination of the financial autonomy of the state entity reveals that

[3] While *Bolden* is the most recent of the Third Circuit decisions stating this principle, it is not the first. As the *Bolden* court noted, 953 F.2d at 816, it followed the analysis previously articulated in *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir.), *cert. denied*, 493 U.S. 850 (1989); *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. and N.J.*, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987); *Kovats v. Rutgers, The State Univ.*, 822 F.2d 1303 (3d Cir. 1987); *Blake v. Kline*, 612 F.2d 718 (3d Cir. 1979), *cert. denied*, 447 U.S. 921 (1980); *Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). The list of factors in the earlier cases states that whether payment will come from the state treasury is one of the more important factors; in its 1989 *Fitchik* decision, 873 F.2d at 659, however, the court emphasized that "whether any judgment would be paid from the state treasury" was the *most important* question.

"a judgment against the entity does not entail a judgment against the state," then the "purpose of the immunity . . . largely disappears." *Jacintoport*, 762 F.2d at 440. Indeed, it is primarily because of the difference in the way in which the Third and Second Circuits have viewed the extent to which the states of New Jersey and New York are responsible for PATH's financial obligations, particularly a money judgment against it, that has led to the split in those circuits on whether PATH is entitled to Eleventh Amendment protections.

B. The States Of New York And New Jersey Neither Fund PATH's Operations Nor Are Involuntarily Liable For A Judgment Against PATH, And Therefore, PATH Is Not Protected By The Eleventh Amendment

1. *PATH Is Prohibited From Pledging The Credit Of The States Or Imposing Any Obligations On The States*

The provisions of the Bi-State Compact compel the conclusion that the states of New York and New Jersey would be liable for a judgment against the Port Authority or its subsidiary, PATH, only if they affirmatively and voluntarily agreed to such liability. Article VII of the Bi-State Compact provides that (N.Y. UNCONSOL. LAW § 6408 (McKinney 1979), Pet. App. 47a)[4]:

> the port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

[4] All references to Pet. App. are to the appendices attached to the Petition for a Writ of Certiorari filed by Albert Hess and Charles F. Walsh. Since the Bi-State Compact and other New Jersey legislation pertaining to the Port Authority is identical or virtually identical to the New York legislation, petitioners reproduced only the New York legislation in their appendices. Accordingly, references in this brief to the state legislation will be to the New York legislation that is reproduced in petitioners' appendices.

Legislation adopting the comprehensive plan for development of the Port Authority also states that the Port Authority (N.Y. UNCONSOL. LAW § 6459 (McKinney 1979), Pet. App. 49a-50a):

> shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given.

Finally, THE PORT AUTHORITY OF N.Y. & N.J.—COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE YEAR ENDED DECEMBER 31, 1991 ("Comprehensive Financial Report") (Pet. App. 60a) states that the Port Authority does not have "the power to pledge the credit of either State or any municipality." The Bi-State Compact, bi-state legislation setting forth the plan for development, and the annual report for the Port Authority leave no doubt that the States of New York and New Jersey did not intend to be liable for any debts of the Port Authority or its subsidiary, PATH. The Ninth Circuit recognized that the unwillingness of a state to support a state-created entity with monies of the state suggests that the entity is not an arm of the state (*Durning*, 950 F.2d at 1426):

> Indeed, if the rationale underlying the Eleventh Amendment is to compel the federal judiciary's respect for a state's own sovereign constitutional authority, then the fact that a state feels compelled by its own constitution not to pledge its funds to support the obligations of a state entity counsels heavily against recognizing that entity as a sovereign arm of the state.

Thus, the states' clear disavowal of the Port Authority's liabilities, standing alone, makes it evident that the Port Authority and its subsidiary, PATH, are not arms of the state entitled to Eleventh Amendment protection. *See Metcalf & Eddy, Inc.*, 991 F.2d at 940.

2. *The States' Appropriations To The Port Authority For Administrative Expenses, Which Must Be Approved By The Governors And May Not Exceed $100,000 Annually, Have Been Unnecessary For Fifty Years, And, In Any Event, Are Not Intended To Satisfy Judgments Against The Port Authority Or PATH*

Despite the seemingly unambiguous nature of the language declaring that the Port Authority has no authority to incur liability on behalf of the States of New York and New Jersey, other language in the Bi-State Compact has proved to be more troubling for the two courts of appeals that have addressed the matter. Bi-State Compact Article XV provides that (N.Y. UNCONSOL. LAW § 6416 (McKinney 1979), Pet. App. 48a):

> Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

The Third Circuit relied upon this provision to conclude that "a judgment could have some impact on the state treasury." *Port Auth. Police Ben. Ass'n*, 819 F.2d at 416. Although the Third Circuit recognized that such a result was improbable, the Third Circuit viewed the language in Bi-State Compact Article XV as evincing an intent to provide financial support if it was ever needed. *Id.* Relying on this same language, the Second Circuit concluded that "the phrase 'salaries, office and other administrative expenses' clearly limits this essentially optional obligation of the two states to a very narrow category of expenses and thus also evidences an intent to insulate the states' treasuries from the vast bulk of the Port

Authority's operating and capital expenses, including personal injury judgments." *Feeney*, 873 F.2d at 631.

When Bi-State Compact Article XV is considered in the context of the overall financial arrangements that govern the Port Authority, the Second Circuit's conclusion that the states' underlying intent in creating the Port Authority was to divest themselves of any liability is more persuasive. The Comprehensive Financial Report unambiguously expresses the states' intentions regarding their financial liability for the Port Authority (Pet. App. 60a):

> The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction or acquisition of facilities upon the basis of its own credit.

This statement is in accord with other statements made in the Comprehensive Financial Report regarding Port Authority expenses. Thus, the Report states that "[t]he costs of providing facilities and services to the general public on a continuing basis are recovered primarily in the form of tolls, fares, fees, rentals and other user charges." Pet. App. 62a. The Comprehensive Financial Report simply reflects the intent of the legislation, which provides that (N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), Pet. App. 51a):

> All details of the effectuation, including but not limited to details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service, of the world trade center, the Hudson tubes and the Hudson tubes extensions by the port authority shall be within its sole discretion and its decision in connection with any and all matters concerning the world trade center, the Hudson tubes and the Hudson tubes extensions shall be controlling and conclusive.

The states' intent that the Port Authority be financially independent is further evidenced by Article VI of the Bi-State Compact (N.Y. UNCONSOL. LAW § 6407, Pet.

App. 46a), which gives the Port Authority the power to issue bonds.[6] The Comprehensive Financial Report echoes the intent that the Port Authority should be responsible for its own indebtedness for it states that "[t]he Port Authority finances construction and acquisition of its facilities primarily by issuing bonds, notes and other obligations and through application of its reserve funds." (Pet. App. 63a). Furthermore, as noted above, the legislation specifically provides that these bonds are not the obligations of either state. *See also Commissioner of Internal Revenue v. Shamberg's Estate*, 144 F.2d 998, 1001, 1007 (2d Cir. 1944), *cert. denied*, 323 U.S. 792 (1945). The authority to issue bonds and, thereby, finance its operations is an indicia of independence and separateness that weighs heavily in favor of finding that the entity is not an arm of the state. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977); *Feeney*, 495 U.S. at 313 (Brennan, J., concurring); *Metcalf & Eddy*, 991 F.2d at 942; *Durning*, 950 F.2d at 1428.

These provisions, when read together, leave no doubt that the States did not intend to assume liability for judgments against the Port Authority. Indeed, from a practical standpoint, there is little likelihood that the States of New York and New Jersey will ever face a decision regarding a judgment against PATH given that the Port Authority has been financially independent for decades. Thus, in 1931 the States of New York and New Jersey acknowledged the Port Authority's ability to sustain itself financially when they established a General Reserve Fund for the Port Authority, which was to be funded by the Port Authority's surplus revenues.[6] *See Port Auth. Police*

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[5] Although PATH itself does not have the authority to incur indebtedness, the Port Authority may transfer money or property to its subsidiaries. N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), Pet. App. 52a.

[6] The surplus revenues from all the Port Authority's facilities are pooled into the General Revenue Fund and that fund serves as security for principal and interest on all bonds that the Port

Ben. Ass'n, 819 F.2d at 416. *See also* N.Y. UNCONSOL. LAW § 7002 (McKinney 1979) (Pet. App. 54a-55a). Moreover, the 1991 Comprehensive Financial Report shows that the Port Authority earned $47,165,000 on its long term investments and $27,649,000 on its short term investments in 1991, resulting in a total return on investments of $74.8 million in one year alone. (Pet. App. 61a). In addition, the Port Authority's revenues exceeded its expenses in 1991 by $519,489. (Pet. App. 60a.) Finally, the Port Authority carries insurance to protect itself against liabilities and has a self-insurance program to cover uninsured losses.[7] In short, it is virtually beyond the realm of possibility that PATH would incur judgments that would exceed its ability to pay.

Moreover, even assuming the possibility, as the Third Circuit did, that the Port Authority could expend all its monies on judgments against it and, therefore, be unable to meet its administrative expenses, Bi-State Compact Article XV does not, as the Third Circuit found, impose liability on the states. First, the Third Circuit's scenario assumes that the Port Authority will use its monies to pay its liabilities and turn to the states for assistance with its administrative expenses. Assuming that to be the case, the Port Authority will not be seeking monies to pay a judgment, which is the requirement for Eleventh Amendment protection. On the other hand, if the Port Authority uses its monies to pay its administrative expenses and turns to the states for assistance in paying its judgments,

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Authority issues. *United States Trust Co. of N.Y. v. State*, 338 A.2d 833, 842 (N.J. Super. Ct. 1975), *aff'd* 353 A.2d 514 (N.J. Sup. Ct. 1976), *rev'd on other grounds*, 431 U.S. 1 (1977). In 1931, the states also transferred the operation and control of the Holland Tunnel to the Port Authority. *Id.*

[7] A number of the courts of appeals, including the Third Circuit, have found this factor significant in other cases. *See, e.g., Bolden*, 953 F.2d at 819; *Barket, Levy & Fine v. St. Louis Thermal Energy*, 948 F.2d 1084, 1087 (8th Cir. 1991); *Fitchik*, 873 F.2d at 661; and *Royal Caribbean v. Puerto Rico Ports Auth.*, 973 F.2d 8, 11 (1st Cir. 1982).

it will not be seeking monies for administrative expenses, the only expenses that are authorized by Article XV of the Bi-State Compact.

Second, the use of the phrase "[u]nless and until" in Article XV of the Bi-State Compact suggests that any appropriations authorized under Article XV were meant to provide monies for administrative expenses during the start-up period *until* such time as revenues were adequate to cover expenditures. It is questionable whether the "unless and until" language of Article XV was meant to apply some seventy years after the start-up period of the Port Authority. Indeed, it appears that the Port Authority has been financially self-sustaining since approximately 1934. *See Shamberg's Estate*, 144 F.2d at 1002.

Third, the Third Circuit's finding that Article XV of the Bi-State Compact mandates that the states provide whatever monies are necessary for the Port Authority to meet its operating expenses focuses only on the first step in the funding process. Under the two-step funding process in Article XV, the States of New York and New Jersey are liable for the Port Authority's or PATH's expenses only if the governors of the two states approve the appropriation. In short, any payment of monies from the states to the Port Authority or PATH is discretionary. As the Third Circuit has recognized, "voluntary payments by a state do not trigger sovereign immunity." *Fitchik*, 873 F.2d at 661. *Accord Barket, Levy & Fine*, 948 F.2d at 1087. Indeed, the Third Circuit observed that even though a state "might feel compelled as a practical matter to subsidize a variety of entities that provide necessary services, . . . [s]uch discretionary subsidies committed in reaction to a judgment, however, would not necessarily transform the recipients into alter egos of the state." *Bolden*, 953 F.2d at 819. *See also Durning*, 950 F.2d at 1425 n.3 ("the fact that a state may ultimately *volunteer* to pay the judgment . . . is immaterial; the question is whether the state treasury is legally obligated.").

Finally, it is significant that even if Article XV of the Bi-State Compact mandated state expenditures on behalf of the Port Authority, the states may only give the Port Authority $100,000 in any year. This Court has denied Eleventh Amendment immunity even though the entity received a "significant amount of money" from the state. *Mt. Healthy*, 429 U.S. at 280. In cases not involving the Port Authority, the Third Circuit has found that the entity was not entitled to Eleventh Amendment protection even when the state provided the entity wih funding in excess of $1 million (*Fitchik*, 873 F.2d at 660), or when the state provided 27% of the entity's revenues (*Bolden*, 953 F.2d at 819).[8] In other words, even if the states paid $100,000 to the Port Authority, that would not be the kind of funding that would lead to a finding that the Port Authority's money comes predominantely from the states. *Compare Washington Metropolitan Area Transit Auth.*, 781 F.2d at 226 (court viewed $42 million appropriation by State of Virginia in two-year period as substantial).

Where, as here, the states are under no obligation to pay PATH's debts or its judgments, and where the states may, in their discretion, appropriate no more than $100,000 in a given year towards administrative expenses, it seems clear that the purpose of Eleventh Amendment immunity is not present and PATH should not be "entitled to partake of the state's immunity." *Fitchik*, 873 F.2d at 660.

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[8] In *Shamberg's Estate*, 144 F.2d at 1002, the Second Circuit noted that the states discontinued the annual appropriations in 1934 because by then revenues were sufficient to meet expenses. By 1944, the date of the decision, the states had provided about $21,500,000 in advances and appropriations, which amounted to only about 10% of the total expenditures of $233,500,000. *Id.* at 1007 & n.4 (Frank, J., dissenting).

II. OTHER FACTORS RELATING TO PATH'S STRUCTURE AND FUNCTION CONFIRM THAT PATH IS NOT AN ARM OF THE STATE AND, THEREFORE, IS NOT PROTECTED BY THE ELEVENTH AMENDMENT

In addition to the issue of whether a state would be liable for any judgment against a state-created entity, the courts of appeals have, on the basis of the Court's analysis in *Lake Country Estates*, reviewed other aspects of the entity's structure and function to determine the status of state-created entities. *Metcalf & Eddy*, 991 F.2d at 939-940; *Robinson v. Georgia Dept. of Transp.*, 966 F.2d 637, 638 (11th Cir.), *cert. denied*, 113 S. Ct. 660 (1992); *Bolden*, 953 F.2d at 818; *Durning*, 950 F.2d at 1423; *Barket, Levy & Fine*, 948 F.2d at 1087; *Farias v. Bexar Cty. Bd. of Trustees*, 925 F.2d 866, 874 (5th Cir.), *cert. denied*, 112 S. Ct. 193 (1991). For the most part, the circuit courts have considered the following factors: (1) how state law characterizes the entity; (2) whether the entity has the power to sue and be sued; (3) whether the entity may enter into contracts in its name; (4) whether the entity has the authority to hold and use property; (5) whether the entity's property is subject to taxation; (6) whether the entity has the power of eminent domain; and (7) whether the state has resorted to a law suit in an attempt to enforce its will upon the agency. As we show below, these factors considered in the aggregate support a finding that PATH is not an arm of the state and, therefore, not entitled to immunity under the Eleventh Amendment.

A. The Enabling Legislation, As Well As The Entity's Own Characterization Of Its Status, Show That The Port Authority Is Not An Arm Of The States But Rather Is More Akin To A Political Subdivision

The Bi-State Compact consistently characterizes the Port Authority in a manner that suggests that the states did not intend for the Port Authority to be an arm of

the states. Article III of the Bi-State Compact, states that the Port Authority is hereby created and states that it "shall be a body corporate and politic." N.Y. UNCONSOL. LAW § 6404 (McKinney 1979), Pet. App. 45a. Article VI of the Bi-State Compact also states that the Port Authority "shall constitute a body, both corporate and politic." N.Y. UNCONSOL. LAW § 6407 (McKinney 1979), Pet. App. 46a. In its decision finding that the Port Authority was an arm of the state, the Third Circuit acknowledged that the term "body corporate and politic" "suggests vulnerability to suit under section 1983." *Port Auth. Police Ben. Ass'n*, 819 F.2d at 415. Similarly, the Eighth Circuit in *Barket, Levy & Fine,* 948 F.2d at 1087, found that the term "body corporate and politic" indicated that the interstate agency in that case was a municipal corporation. *See also Durning*, 950 F.2d at 1427 (entity referred to as "body corporate" in enabling legislation clearly has its own independent corporate identity).

Similarly, the comprehensive plan, enacted by the states, refers to the Port Authority in terms suggesting that it is not an arm of the state. Thus, the legislation states that the Port Authority "shall be regarded as the municipal corporate instrumentality of the two states." N.Y. UNCONSOL. LAW § 6459, Pet. App. 49a. Significantly, in its Comprehensive Financial Report, the Port Authority admits that it is "a municipal corporate instrumentality and political subdivision of the States of New York and New Jersey . . . ." (Pet. App. 59a).[9] A political subdivision is undisputedly not entitled to immunity. *Lake Country Estates*, 440 U.S. at 401. Although the Third Circuit viewed the language "municipal corporate instrumentality" as suggesting "nothing definite in either direction" (*Port Auth. Police Ben. Ass'n*, 819 F.2d at 415), the Second Circuit viewed the use of that term as

[9] The Comprehensive Financial Report also refers to the Port Authority as a "public corporation serving the people of the New York-New Jersey metropolitan region." (Pet. App. 60a).

"[f]avoring the non-application of the Eleventh Amendment immunity to PATH." *Feeney*, 973 F.2d at 631.

Finding that the statutory language does not conclusively establish that the Port Authority is an arm of the state, the Third Circuit relied on a number of decisions in which the state courts concluded that the Port Authority is "a state agency performing functions on behalf of the state." *Port Auth. Police Ben. Ass'n*, 819 F.2d at 415. However, in a subsequent decision, the Third Circuit, sitting *en banc*, stated that "a state law determination of sovereign immunity may coincide with and influence the federal law determination of Eleventh Amendment status, but the former does not conclusively determine the latter." *Bolden*, 953 F.2d at 815. In any event, the decisions upon which the Third Circuit relied did not address the question of whether the states would be legally liable for money judgments against the Port Authority and, therefore, failed to address the issue critical to determining Eleventh Amendment immunity. *See Jacintoport*, 762 F.2d at 438, 440 (Fifth Circuit refused to rely on state court decisions that addressed only a few of the factors that must be weighed in determining Eleventh Amendment immunity).

In sum, the states' characterization of the Port Authority as a "body corporate and politic" and the Port Authority's own admission that it is a "municipal corporate instrumentality and political subdivision of the states of New York and New Jersey" unambiguously demonstrate that the Port Authority, and derivatively, PATH are not arms of the state. In any event, even if the legislation could be viewed as characterizing PATH as a governmental entity, such characterization cannot "confer Eleventh Amendment immunity absent a binding and ongoing commitment to absorb a substantial portion of that entity's operating deficit." *Washington Area Metropolitan Area Transit Auth.*, 781 F.2d at 228 (Wright, J. concurring).

B. Factors Relating To The Level Of PATH'S Autonomy Also Suggest That PATH Is Not An Arm Of The States

The autonomy that the Port Authority has in performing the functions for which it was created weigh in favor of denying the Port Authority immunity under the Eleventh Amendment. Article VI of the Bi-State Compact gives the Port Authority "full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within [the Port District]; and to make charges for the use thereof." N.Y. UNCONSOL. LAW § 6407, Pet. App. 46a. According to the Bi-State Compact, transportation facilities include (N.Y. UNCONSOL. LAW § 6423 (McKinney 1979):

> railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, car-floats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, air craft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property.

In addition to the broad authority given the Port Authority by virtue of the expansive definition of the term "transportation facility," the Port Authority is vested with all necessary and appropriate powers needed to develop the port of New York (N.Y. UNCONSOL. LAW § 6459, Pet. App. 49a). In order to carry out these broad responsibilities, the Port Authority has sole discretion with respect to the "details of financing, leasing, rentals, tolls, fares, fees and other charges, rates, contracts and service." (N.Y. UNCONSOL. LAW § 6612, Pet. App. 51a).

Moreover, to ensure that the Port Authority can successfully "plan, develop, and operate terminals and other facilities of transportation and commerce" (Pet. App. 59a) in the Port District, the states have given the Port Authority other powers that are indicia of independence from the state. Significantly, the Port Authority has the

right to sue and to be sued (N.Y. UNCONSOL. LAW §§ 6466, 6612, Pet. App. 50a, 53a). The Ninth Circuit has noted that an entity which has the authority to sue or be sued in one's own name strongly suggests that the entity has "the organizational autonomy and legal independence" necessary to find that the entity is not an arm of the state. *Durning*, 950 F.2d at 1427 n. 4. *See also Belanger v. Madera Unified School Dist.*, 963 F.2d 248 (9th Cir. 1992), *cert. denied*, 122 L.Ed.2d 674 (1993) (that school district can sue and be sued militates against immunity).

PATH also has authority (1) "to own, hold, lease and/operate real or personal property" (N.Y. UNCONSOL. LAW §§ 6407, 6951 (McKinney 1979), Pet. App. 46a, 54a); and (2) to enter into contracts (N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), Pet. App. 51a-54a) ("all details of the effectuation, including . . . contracts . . . shall be within its sole discretion . . ."). The authority to undertake these responsibilities is also an indication of independence from the state. *Metcalf & Eddy*, 991 F.2d at 942; *Royal Caribbean*, 973 F.2d at 11; *Durning*, 950 F.2d at 1427; *Fitchik*, 873 F.2d at 663.

Significantly, neither the Port Authority nor PATH have the authority to levy taxes or assessments. (N.Y. UNCONSOL. LAW § 6459 (McKinney 1979), App. 49a). Since the power to tax is "perhaps the most important power possessed by the State" (*Shamberg's Estate*, 144 F.2d at 1004), it seems clear that the states did not intend PATH to be an alter ego of the states.

As the Court noted in *Lake Country Estates*, 440 U.S. at 402, one of the more "forceful demonstrations" of an agency's autonomy is indicated by the fact that the state has to engage in litigation in an attempt to impose its will upon the entity. Such a demonstration exists with respect to the states' relationship with the Port Authority. Thus, in *People v. Port of New York Auth.*, 315 N.Y.S.2d 9

(1970), the State of New York sued the Port Authority in an attempt to force it to discontinue polluting the water.

Another equally compelling example of the inability of the States of New York and New Jersey to impose their will on the Port Authority is revealed in the history of a dispute that resulted in this Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). The dispute that culminated in the Court's decision in *United States Trust Co.* was between the United States Trust Company, as trustee for the holders of Port Authority bonds, and the State of New Jersey, and concerned a 1962 statutory covenant and its subsequent repeal. However, the history leading to the 1962 statutory covenant and its subsequent repeal reveals a great deal about the states' abilities to direct the actions of the Port Authority. As the lower court's decision in *United States Trust Co.* reveals, the states were desperately seeking a solution to the mass transportation problems that were causing havoc in the states. *See United States Trust Co. of N.Y. v. State*, 338 A.2d 833, 847 (N.J. Super. Ct. 1975). Despite the Port Authority's broad authority over transportation facilities and the Port District, the Port Authority persisted in its refusal to assume responsibility for commuter transportation, primarily because of the projected deficit involved in operating commuter transit. *United States Trust*, 338 A.2d at 848. In 1958, the Port Authority not only lobbied vigorously against a bill introduced in the New Jersey legislature which directed the Port Authority to take responsibility for interstate rail mass transit between New Jersey and New York but retaliated by including a new safeguard in its bonds that prevented using the General Reserve Fund to secure bonds for new facilities unless the "Port Authority first certified that the issuance of the bonds would not 'materially impair the sound credit standing' of the Port Authority." *United States Trust Co.*, 431 U.S. at 8. *See also United States Trust Co.*, 338 A.2d

at 848. The Port Authority's action effectively stopped the passage of the 1958 bill. 338 F.2d at 848-49.[10]

Commuter transit problems continued to mount and by 1960 an immediate concern was the continued operation of the bankrupt Hudson & Manhattan Railroad ("H&M"). In order to placate the Port Authority's concerns about its credit ratings and the perception of its bondholders, the legislatures searched for a way that the Port Authority could take over operations of the H&M without becoming further involved in the deficits of the commuter railroads. 338 A.2d at 849. The result was the passage of the 1962 Covenant. *Id.* at 849-855. The Port Authority relied on the 1962 Covenant as justification for refusing to increase its role in mass transportation. *Id.* at 859. Ultimately, repeal of the 1962 Covenant proved to be a necessary part of the states' efforts to get the Port Authority and PATH to assume more responsibility for mass transit in the Port District. *Id.* at 857-863. In short, despite the determined efforts of the state legislatures, the Port Authority was able to delay its assumption of responsibility for rapid transit between New Jersey and New York for many years. *See United States Trust Co.*, 353 A.2d at 530-532 (Peshman, J., concurring in part and dissenting in part).

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[10] Interestingly, the Third Circuit distinguished the Port Authority from the New Jersey Transit on the basis that the Port Authority had to obtain authorization from the states of New Jersey and New York in order to undertake a new project. *Fitchik*, 873 F.2d at 664. While this may be so, it is a double-edged sword for as the facts in *United States Trust Co.* show, the states were forced to resort to legislation to force the Port Authority to undertake a project, even though it presumably came within the Port Authority's jurisdiction under the terms of the Bi-State Compact.

C. The Indicia Of Sovereignty That Militate In Favor Of Immunity For PATH And The Port Authority Are Outweighed By The Overwhelming Indicia Against Immunity

Tempering the list of attributes that suggest that PATH is not an arm of the state are the following factors relating to PATH's autonomy which traditionally suggest immunity under the Eleventh Amendment: (1) bonds or other securities issued by the Port Authority are free from taxation by either state (N.Y. UNCONSOL. LAW § 6459 (McKinney 1979), Pet. App. 49a); (2) the Port Authority, and derivatively, PATH have the power of eminent domain and condemnation (N.Y. UNCONSOL. LAW § 6516 (McKinney 1979); (3) the Port Authority, as well as PATH, are exempt from paying property taxes (N.Y. UNCONSOL. LAW § 6611 (McKinney 1979); (4) each of the states appoints six of the twelve members of the governing Board of Commissioners, who are then subject to confirmation by the respective State Senate (N.Y. UNCONSOL. LAW § 6405 (McKinney 1979), App. 59a); (5) the governors of the two states have the right to veto PATH's actions (N.Y. UNCONSOL. LAW § 6612 (McKinney 1979), App. 53a); and (6) the Port Authority and derivatively, PATH must make annual reports to the legislature of both states, setting forth the operations and transactions conducted by it (N.Y. UNCONSOL. LAW § 6408 (McKinney 1979), App. 47a).

The first factor should be entitled to little weight since bonds issued by counties and municipalities, which are clearly not arms of the states, are also frequently exempted from taxes by the states. Indeed, as indicated in *Shamberg's Estates*, 114 F.2d at 1003, interest on bonds issued by political subdivisions, also not considered to be arms of the state, are exempt from federal taxation.[11]

[11] In *Shamberg's Estate*, the court found that the Port Authority was a political subdivision under the federal tax regulations. The regulations define a political subdivision to include "special assessment districts . . . such as road, water, sewer, gas,

Similarly, even though PATH is exempt from taxation on its real property, the legislation provides that "no municipality shall suffer undue loss of taxes and assessments by reason of the acquisition and ownership of property by the port authority" and empowers PATH to agree to pay the municipalities a sum "in lieu of taxes" that shall be no more than the amount that the previous owner paid in taxes to the municipality. N.Y. UNCONSOL. LAW § 6611 (McKinney 1979). With respect to the powers of eminent domain, the Third Circuit acknowledged in *Fitchik*, 873 F.2d at 663, that the power of eminent domain "does not mean that [a state-created entity] is necessarily entitled to [E]leventh [A]mendment immunity" and noted that counties and municipalities in New Jersey also exercise that power.

The final three factors relate to the control and influence that the states have over PATH. In *Barket, Levy & Fine*, 948 F.2d at 1088, the Eighth Circuit reasoned that even though the governors of the two states appointed the commissioners to the bi-state entity, the governors had the right of veto, the bi-state entity had to provide an annual report to the governor,[12] and the states had the right to approve the bi-state entity's development plans, the states' control over the bi-state entity was "not unlike the control states have over counties." Relying instead on the fact that the states were not responsible for funding the bi-state entity and were not legally obligated for its liabilities and obligations, the court held that the bi-state entity was not an arm of the state. *Id.* Similarly, when the factors suggesting sovereignty are balanced against

light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of the State." 144 F.2d at 1005.

[12] The requirement that PATH submit an annual report can be equated with the requirement that municipal corporations, which are clearly not arms of the state, submit annual reports of their financial condition to the comptroller. N.Y. GEN. MUN. LAW § 30 (McKinney 1986).

the great degree of autonomy the Port Authority is given in carrying out the functions for which it was created, and that it and it alone is liable for judgments against it, the balance is tilted towards those factors that suggest that the Port Authority, and, therefore, PATH are not protected by the Eleventh Amendment.

In finding that the Port Authority is entitled to Eleventh Amendment immunity, the Third Circuit also concluded that its functions were governmental and not proprietary. Although the governmental-proprietary distinction is no longer a valid basis for determining Eleventh Amendment immunity (*Garcia v. San Antonio Metro. Transit Authority*, 469 U.S. 528 (1985); *Fitchik*, 873 F.2d at 659 n.2), it deserves mention that other courts have reached a different view regarding the responsibilities assigned to the Port Authority and PATH.

In *Royal Caribbean*, 973 F.2d at 10, the court concluded that the Puerto Rico Ports Authority, which was charged with " 'own[ing], operat[ing], and manag[ing] . . . transportation facilities' . . . , including the 'public property docks' " and with charging fees for the use of the docks, was engaged in proprietry activities rather than governmental activities. Here too, the Port Authority and PATH charge for their services and those revenues substantially contribute to paying the expenses of the operations. Similarly, the operation of bridges and tunnels is "often undertaken by privately-owned public utility companies." *Shamberg's Estate*, 144 F.2d at 1007 (Frank, J., dissenting). Finally, it should be noted that in *State v. Kirk*, 201 A.2d 102, 105 (Essex Cty. Ct. 1964), *aff'd* 211 A.2d 200 (N.J. Super. Ct. 1965), the court found that "the operation and conduct of the airport facilities in the City of Newark by the Port Authority are akin to that of a private business operation" and, therefore, "the Port Authority, in the same manner as a private owner of property, may protest and prosecute a trespass on its premises."

Related to the issue of what functions PATH performs is the issue of the geographical boundaries of PATH authority. In *Jacintoport*, 762 F.2d at 443 (emphasis in original), the Court quoted the following test for determining whether or not the state entity performs governmental functions:

> Although it has been said that the character and nature of municipal corporations remain at all times the same, [footnote omitted] *in their public or governmental capacity they act as the agent of the state for the benefit and welfare of the state as a whole, but when acting for the peculiar and special advantage of their inhabitants, rather than for the good of the state at large, they act in a private or proprietary capacity.*

Here, the Port Authority and PATH are acting for the special advantage of the residents of the Port District, a 1,500 square mile area in the New York Harbor area. Accordingly, under the test articulated in *Jacintoport*, PATH is performing a proprietary, or local function. *Jacintoport*, 762 F.2d at 443 (the Port Authority's concern was the Baton Rouge Port and it was, therefore, not performing a statewide or governmental function).

In short, the secondary factors preponderate against immunity. The statutory language uses terminology that convey an intent to create an entity akin to a political subdivision. Although there is some oversight by the states over PATH, the indicia of independence—*e.g.*, the power to sue and be sued; to purchase, lease and sell real property; and to enter into contracts—coupled with the states' need to engage in litigation in an attempt to impose their will, overwhelmingly tilts the balance of these secondary factors against Eleventh Amendment immunity.

CONCLUSION

For the reasons set forth above, RLEA submits that the decision of the Third Circuit should be reversed.

Respectfully submitted,

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v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

CHARLES F. WALSH,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of a bistate agency created by interstate compact, is entitled to sovereign immunity from suit in federal court under the Eleventh Amendment.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 93-1197

ALBERT HESS,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

CHARLES F. WALSH,
Petitioner,
v.
PORT AUTHORITY TRANS-HUDSON CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, AND NATIONAL ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling in-

terest in legal issues that affect state and local governments. In particular, *amici* representing state governments have an interest in maintaining their ability to address multi-state needs by creating entities answerable to two or more States, which enjoy the same immunity from suit as do the compacting States.

Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in the resolution of this case.[1]

SUMMARY OF ARGUMENT

The Eleventh Amendment is emblematic of the principle that in joining the federal Union, the States did not surrender all incidents of their sovereignty. Among the elements of sovereignty that they retained for themselves and entities under their control was their sovereign immunity—including immunity from suit in federal court. As the Court has noted, that immunity was retained, except insofar as its surrender was implicit in the "plan of the Convention." *Monaco* v. *Mississippi*, 292 U.S. 313, 322-23 (1934) (citation omitted). Thus, "Eleventh Amendment" immunity is not limited by the language of the Eleventh Amendment, but rather is a function of the role played by the States in forming the Union and "the respect owed them as members of the federation." *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 113 S.Ct. 684, 689 (1993); *see also Hans v. Louisiana*, 134 U.S. 1 (1890). The historic understanding that state agencies—as arms of the State subject to state control

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

—are entitled to assert immunity from suit in federal court is a reflection of the political history of the Union.

Political history thus belies the notion that bistate agencies, subject to the control of two or more compacting States, are not entitled to the same immunity from suit that the compacting States themselves enjoy. This Court's cases establish that where (1) the compacting States intend their bistate creation to enjoy sovereign immunity, and (2) their creation remains subject to political control at the state level, a finding that the entity is entitled to "Eleventh Amendment immunity" is warranted. Unless Congress has clearly specified that such a bistate entity is not immune from suit, this Court's cases require that the entity's immunity be respected.

The conclusion that bistate agencies which are answerable to the compacting States at the level of state government retain an immunity from suit in federal court is supported by *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In that case, the Court held that a bistate agency which sought immunity without the imprimatur of the compacting States and was created as a political subdivision, politically accountable to local government units, was not entitled to assert Eleventh Amendment immunity. In this case, however, the Port Authority has sovereign immunity because (1) the compacting States intended to grant it sovereign immunity and (2) it is under the control of, and accountable to, New Jersey and New York at the state government level. These fundamental features of the Port Authority distinguish it from the entity whose claim of immunity was rejected by the Court in *Lake Country Estates*. Con-

sequently, respondent PATH, the Port Authority's wholly owned subsidiary, is entitled to sovereign immunity.

ARGUMENT

I. THE NATURE OF "ELEVENTH AMENDMENT IMMUNITY" GUIDES ITS APPLICATION IN THIS CASE

A. The Court Has Clarified The Foundations Of Eleventh Amendment Immunity Since Its Decision In *Lake Country Estates*

1. In seeking standards for applying the Eleventh Amendment to bistate agencies formed by interstate compacts, the parties, and the courts below, have focused on *Lake Country Estates*. In *Lake Country Estates*, the Court held that there is no absolute rule extending "Eleventh Amendment immunity to every bistate agency." 440 U.S. at 400. The Court went on to hold that the entity claiming immunity in that case—a regional planning agency which was organized as a political subdivision accountable to various local governments within the compacting States, rather than to the compacting States themselves—was not immune from suit in federal court.[2] Given the organization of the entity in that case, and the compacting States' disavowal of any intention to grant it sovereign immunity, the Court determined that absent an "absolute rule" that all bistate agencies are entitled to immunity, the entity claiming immunity in that case could not avail

[2] The Court's precedents hold that while States and "arms" of the States are entitled to sovereign immunity, political subdivisions of States, such as counties and municipalities, are not. *See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

itself of "the sovereign immunity provided by the Constitution to Nevada and California." *Id.* at 402.

The Port Authority is plainly unlike the bistate entity claiming immunity in *Lake Country Estates*. Nonetheless, the factors which this Court considered in *Lake Country Estates* provide useful guidance in understanding why the Port Authority is entitled to sovereign immunity.[3] Indeed, an analysis of the two factors which the Court found determinative in *Lake Country Estates*—the absence of any intention on the part of the compacting States to confer immunity and the lack of state control of the entity—compel the conclusion that the Port Authority enjoys the immunity of the compacting States.

Petitioners suggest, however, that *Lake Country Estates* evidences a presumption against allowing bistate agencies to assert sovereign immunity. Even if *Lake Country Estates* could be said to reflect as much, such premises have not survived this Court's more recent cases elaborating on the historical and constitutional foundations of "Eleventh Amendment immunity," which should inform the application of *Lake Country Estates* to this case. *See, e.g., Puerto Rico Aqueduct*, 113 S.Ct. at 684. Indeed, the Court's more recent teachings on the subject make clear that the Port Authority enjoys the same immunity from federal court suit as is possessed by the compacting States themselves.

2. Petitioners ask the Court to focus on the language of the Eleventh Amendment, and particularly

[3] Any sovereign immunity possessed by the Port Authority is likewise available to respondent PATH, which is a wholly owned subsidiary of the Port Authority. *See* Resp. Br. 4 n.2.

its reference to "one of the United States," as support for their contention that the Port Authority is not entitled to immunity from suit in federal court. And indeed, in *Lake Country Estates* this Court observed initially that the Eleventh Amendment applies by its terms to "one of the United States." 440 U.S. at 400. The Court ultimately found "no justification for reading additional meaning into the limited language of the Amendment." *Id.* at 401.

But it is exactly this premise—that immunity from federal court suit is based on the language of the Eleventh Amendment—that has been clarified by this Court's more recent cases. The Eleventh Amendment is not the source of the States' immunity from suit in federal court. Rather, that immunity is an essential attribute of the sovereignty possessed by the States when they joined the Union.[4] As the Court has recognized, the States did not surrender this incident of their sovereignty when they ratified the Constitution, except as called for by the document itself. *See, e.g., Monaco*, 292 U.S. at 323.[5]

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[4] As Hamilton explained,

> [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

The Federalist No. 81, at 455 (Isaac Kramnick ed., 1987).

[5] "That a state may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit

Thus, despite

> the narrowness of its terms, [the Court has] . . . understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms: that the States entered the federal system with their sovereignty intact; that the judicial authority in Article III is limited by this sovereignty . . . ; and that a State will therefore not be subject to suit in federal court unless it has consented to suit, either expressly or in the "plan of the convention."

Blatchford v. Native Village of Noatak, 111 S.Ct. 2578, 2581 (1991).[6] Moreover, it has long been recognized that agencies that are "arms of the State" partake fully of the State's sovereign immunity. *See Puerto Rico Aqueduct*, 113 S.Ct. at 687-88 ("Absent waiver, neither a State nor agencies acting under its

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brought by private parties against a state without consent given . . . ." *In Re New York*, 256 U.S. 490, 497 (1921). *See also Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 479-80 (1987) (plurality opinion); *Employees v. Missouri Dep't of Public Health & Welfare*, 411 U.S. 279, 291-92 (1973) (Marshall, J., concurring in the result).

[6] The historical foundation for these conclusions deserves summarizing here not only for the light that it sheds on the proper disposition of this case, but because the lower courts continue to view this Court's Eleventh Amendment jurisprudence as some sort of "creative" or "abstract impressionistic" effort at constitutional interpretation. *See Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.*, 991 F.2d 935, 938 (1st Cir. 1993). That is obviously an inaccurate characterization of the Court's approach. Rather, this Court has proceeded on the basis of an historical understanding of sovereignty that survived the Constitution—and a realistic appraisal of the extent to which sovereignty was necessarily surrendered as part of the basic federal plan.

control may 'be subject to suit in federal court.' ") (citations omitted).[7]

Although the doctrine of state sovereign immunity is often discussed in connection with the Eleventh Amendment, the two are not the same. The Eleventh Amendment was crafted to overcome the suggestion that Article III of the Constitution, by establishing federal court jurisdiction over certain suits involving States, was perforce an abrogation of state sovereign immunity. *See Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The public reaction to this Court's *Chisholm* decision—following so closely upon the ratification of the Constitution itself—confirmed that this had never been the intention of the Framers and the States. Thus, the Eleventh Amendment rectified the specific error of *Chisholm* by limiting the federal judicial power in the only situation in which Article III had intimated that a State might be subjected to a common law suit in federal court. *See Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

3. Because the Eleventh Amendment was intended merely to overturn *Chisholm*, the Court has repeatedly rejected the argument that the breadth of state sovereign immunity is limited by the language of the

[7] *See also Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988) ("[t]he 'State' for eleventh amendment purposes includes state agencies"); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 301 (6th Cir. 1984) ("[w]hen an action is brought against a public agency or institution . . . the application of the Eleventh Amendment turns on whether said agency can be characterized as an arm or alter ego of the state"), *cert. denied*, 469 U.S. 1113 (1985); *Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.*, 948 F.2d 1084, 1086 (8th Cir. 1991) ("[t]he Eleventh Amendment protects a bistate agency if the agency is an arm of the compacting states").

Eleventh Amendment. *See, e.g., Hans*, 134 U.S. at 20-21.[8] Thus, the doctrine of state sovereign immunity "was part of the understood background against which the Constitution was adopted, and which its jurisdictional provisions did not mean to sweep away." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 32 (1989) (Scalia, J., concurring in part and dissenting in part). *See Welch*, 483 U.S. at 487 ("The contours of state sovereign immunity are determined" not by the Eleventh Amendment, but "by the structure and requirements of the federal system."). In short, the Eleventh Amendment is emblematic of the States' sovereign immunity; it neither grants nor limits it.

4. To be sure, in ratifying the Constitution, the States surrendered some of their sovereignty, including some portion of their sovereign immunity. The Court has held, however, that the surrender was limited to what "the plan of the convention" required.

[8] In *Hans*, the Court held that while the Amendment makes no mention of suits brought against a State by its own citizens, such suits nevertheless cannot be maintained in federal court absent a waiver of immunity. 134 U.S. at 15-17. As the Court later explained:

> Manifestly, we cannot rest with a mere literal application of the words of section 2 of article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against nonconsenting States. Behind the words of the constitutional provisions are postulates which limit and control. There is the . . . postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a "surrender of this immunity in the plan of the convention."

Monaco, 292 U.S. at 322-23 (quoting *The Federalist* No. 81 (Alexander Hamilton)) (footnote omitted).

Monaco, 292 U.S. at 323. The circumstances under which the constitutional plan implied a surrender of sovereign immunity are narrow.[9]

5. The most important aspect of that surrender for present purposes is reflected in the Court's current understanding that under the commerce power, Congress can abrogate the States' immunity when "necessary and proper." Thus, in *Pennsylvania v. Union Gas*, five justices confirmed dicta in prior cases that Congress may subject States to suit in federal court when acting pursuant to the Commerce Clause. 491 U.S. at 13-23 (plurality opinion); *id.* at 57 (White, J., concurring in the judgment in part and dissenting in part). *Cf. Welch*, 483 U.S. at 475 (plurality opinion) (assuming "without deciding or intimating a view of the question" under Commerce Clause); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 252 (1985) ("[a]ssuming, without deciding" same point).[10]

If this understanding is correct, the basis for it must be that the States expressly ceded substantive legislative power to the federal government by join-

[9] The Court has recognized that the United States may sue States in federal court. Absent this authority, "the permanence of the Union might be endangered." *Monaco*, 292 U.S. at 329 (quoting *United States v. Texas*, 143 U.S. 621, 645 (1892)). It is likewise inherent in the constitutional arrangement that States may sue other States in a federal forum because "[t]he establishment of a permanent tribunal with adequate authority to determine controversies between the States . . . was essential to the peace of the Union." *Id.* at 328.

[10] It had been settled for some time that state sovereignty necessarily gives way if Congress expressly subjects States to suit pursuant to Section 5 of the Fourteenth Amendment. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

ing a Union in which federal law would be supreme. Thus, Congress may, pursuant to its powers under the commerce clause, create a cause of action against a State and provide for its enforcement in the federal courts. *See Union Gas*, 491 U.S. at 13-23 (plurality opinion). The most significant surrender of state sovereignty was the cession to Congress of the power to make substantive law and make that law the supreme law of the land. The power to subject States to federal court suit follows from that surrender.[11]

6. Regardless of whether *Union Gas* was correctly decided, *see, e.g.*, 491 U.S. at 30-45 (Scalia, J., concurring in part and dissenting in part, joined by Rehnquist, C.J., O'Connor and Kennedy, JJ.), there is assuredly nothing in Article III granting authority to the federal judiciary to override the States' retained immunity. Moreover, because congressional "abrogation of state sovereign immunity upsets 'the fundamental constitutional balance between the Federal Government and the States,'" *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985)), the Court has concluded that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." *Atascadero*, 473 U.S. at 242. *See also Dellmuth*, 491 U.S. at 230 ("evidence of congressional intent must be both unequivocal and textual"); *Hoffman v. Con-*

[11] Notwithstanding this general understanding that Congress may overcome state sovereign immunity, Congress' power is not unlimited. The Tenth Amendment embodies a core of state sovereignty beyond the scope of Congress' power. *See New York v. United States*, 112 S.Ct. 2408, 2434-35 (1992).

necticut Dep't of Income Maintenance, 492 U.S. 96, 101 (1989).

This requirement of a clear congressional directive is itself implicit in the "plan of the convention." To the extent the States can be said to have ceded "powers of abrogation," *Dellmuth*, 491 U.S. at 227-28, these powers were ceded only to Congress, not the judiciary. Having ceded to Congress the authority to subject a State to federal court suit, a State may properly insist that Congress unmistakably manifest its intention to exercise such authority before it is otherwise involuntarily subjected to suit in federal court. For the federal judicial branch to abrogate state sovereign immunity on its own, without clear and unambiguous direction from Congress, would involve an assertion of federal power not contemplated by the Framers, nor consented to by the States.

B. Bistate Agencies That Are Subject To State Control Are Presumptively Entitled To Sovereign Immunity

The upshot of the history and understanding of sovereign immunity described above, and its implications for this case, are severalfold.

1. First, issues involving the scope of sovereign immunity are fundamentally questions of the States' intentions. This approach is founded on the Court's longstanding recognition that the States retained all aspects of immunity, except what they necessarily surrendered when they ratified the Constitution and the Fourteenth Amendment or have specifically decided to waive. "Absent waiver, neither a State nor agencies acting under its control may 'be subject to suit in federal court.'" *Puerto Rico Aqueduct*, 113 S.Ct. at 687-88 (citation omitted); *see also Florida*

Dep't of Health & Rehabilitative Servs. v. Florida Nursing Home Assoc., 450 U.S. 147, 150 (1981) (per curiam) (rejecting notion that general waiver of sovereign immunity constituted waiver for Eleventh Amendment purposes).

Petitioners suggest that *Lake Country Estates* requires that bistate agencies affirmatively show that their creating States intended to grant them immunity. This reading of *Lake Country Estates* is at odds with the Court's usual approach, which requires that plaintiffs affirmatively show that the States clearly intended to waive their immunity. *See Atascadero*, 473 U.S. at 241; *Florida Nursing Home*, 450 U.S. at 150. In any event, even if a bistate agency must affirmatively show that the States which created it intended to confer their sovereign immunity on it, New York and New Jersey have clearly done so here. *See* pp. 18-20 *infra*.

2. Because the language of the Eleventh Amendment does not limit the scope of the States' sovereign immunity, *see Welch*, 483 U.S. at 487; *Hans*, 134 U.S. at 20-21, the principal issue in determining whether a state-created entity retains Eleventh Amendment immunity is whether that entity is subject to the State's control so as to render it an arm of the State. *See Mt. Healthy*, 429 U.S. at 280; *Puerto Rico Aqueduct*, 113 S.Ct. at 687-88; *Lake Country Estates*, 440 U.S. at 400-02. The Court's precedents also hold that political subdivisions such as counties, local boards and municipalities cannot claim the immunity. *See Lincoln County*, 133 U.S. at 530; *see also Mt. Healthy*, 429 U.S. at 280-81. Consistent with this framework, the Court has recognized that bistate agencies that act as arms of the

compacting States can validly assert Eleventh Amendment immunity. *Lake Country Estates*, 440 U.S. at 400-01. Thus, where "the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves" by making the entity answerable to the States' governments, the entity is entitled to the States' immunity. *Id.*

3. The rationale which has guided the Court's decisions recognizing that States and their arms are entitled to the immunity while political subdivisions such as counties, boards, and municipalities are not, is likewise instructive in determining whether a bistate agency such as the Port Authority is entitled to the defense. Political subdivisions such as counties and municipalities, while undoubtedly exercising an important "slice of state power," were not themselves party to the constitutional compact. *See generally Blatchford*, 111 S.Ct. at 2581-82 (tying sovereign immunity to the States' participation as States in the federal plan and construing the scope of immunity by looking to the nature of the constitutional compact). That is the simple historical rationale for the dichotomy established by this Court's cases between city and county governments, on the one hand, and state agencies, on the other, for Eleventh Amendment purposes. *See Mt. Healthy*, 429 U.S. at 280.

Beyond the historical fact that such units of local government are not "founding members" of the federal Union entitled to sovereign immunity, the political base or constituency of a municipality, a county, or a local district, is ordinarily only a subconstituency of a State's citizenry. Such entities are ordinarily answerable through the electoral process to the citizens within the boundaries of the particular subdivision. In contrast, the Port Authority's commis-

sioners are not answerable through the electoral process to any subconstituency (such as those who live within the geographical boundaries of the port district). Instead, they are accountable to the compacting States through the powers of appointment and removal which are vested in the state governments of New York and New Jersey.

To be sure, bistate agencies address needs which cross the respective States' boundaries and therefore may require congressional approval under the Compact Clause of the Constitution. *See* U.S. Const. art. I, § 10, cl. 3. But provided the entity remains answerable to, and acts as an instrumentality of the compacting States *qua* States, *see Puerto Rico Aqueduct*, 113 S.Ct. at 688, it is entitled to the historic mantle of sovereign immunity that each State possesses individually. As the Court stated in *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 (1959) (footnote omitted), bistate agencies perform "high functions in our federalism including the operation of vast interstate enterprises." And certainly, States cannot serve as laboratories for social and economic experiment if they must pay the added price of losing their Eleventh Amendment immunity whenever the creation of a bistate agency is the best way to meet the changing needs of their citizens. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-47 (1985) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) (noting that "[t]he science of government . . . . is the science of experiment"). Because a suit against such an agency is a suit against a sovereign, the agency is entitled to whatever sovereign immunity was conferred on it by the compacting States.

4. The breadth of the States' sovereignty as members of the federal Union, and the political accountability of the entity claiming immunity, undermine petitioners' narrow focus on whether a judgment against PATH will be paid directly from the treasuries of either compacting State. *See* Pet. Br. 33-38. That the States put their full faith and credit behind the entity may offer some affirmative indication that the entity is answerable and responsible to the compacting States. But the central issue is one of *political*, not financial, organization. Sovereign immunity is more than an expedient for safeguarding the state treasury. As the Court explained in *In Re Ayers*, 123 U.S. 443, 505-06 (1887), the amendment "should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose." Thus, the Court recently stated, the

> claim that the Eleventh Amendment confers only protection from liability misunderstands the role of the Amendment in our system of federalism: "[t]he very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." The Amendment is rooted in a recognition that the States, although a union, maintain attributes of sovereignty, including sovereign immunity. It thus accords the States the respect owed them as members of the federation.

Puerto Rico Aqueduct, 113 S. Ct. at 689 (citations omitted). *See also id.* at 689 n.5 ("The Eleventh Amendment is concerned not only with the States' ability to withstand suit, but with their privilege not to be sued.").

5. The Court's more recent teachings on the Eleventh Amendment have one further significance. This Court historically has been reluctant to find that particular entities are vested with sovereign immunity. That reluctance should now be tempered by the understanding that such immunity can, in a proper case, be overridden by Congress where federal interests so require. The stakes were much higher when a holding that an entity was entitled to avail itself of Eleventh Amendment immunity threatened to place that entity entirely beyond the power of Congress—at least as respects the important power to require the entity to answer in damages for violations of federal law in federal court.

There is assuredly no established presumption which *precludes* bistate agencies that perform important state governmental functions from asserting Eleventh Amendment immunity. Petitioners' misguided assertion that there is such a presumption, *see* Pet. Br. 13-14, lacks any foundation in the Constitution. *Lake Country Estates* itself recognized that States can structure bistate agencies so as to retain their sovereign immunity. 440 U.S. at 401. Moreover, such a presumption is fundamentally inconsistent with the principles of federalism embodied in both the Eleventh Amendment and the structure of the Constitution. *See, e.g., Garcia*, 469 U.S. at 545-46; *Petty*, 359 U.S. at 279.

With respect to entities formed by interstate compact, Congress is given a singular opportunity to speak to the issue. If Congress has not spoken, and the entity in question performs functions for the compacting States and remains answerable to those States (*compare Lake Country Estates*, 440 U.S. at 402), that entity is entitled to a presumption of sov-

ereign immunity—the same presumption afforded any other agency "under the control" of a State. *See, e.g., Atascadero*, 473 U.S. at 239-46.

Indeed, since Congress is charged with vindicating federal authority, it is far more appropriate to place the burden on Congress to expressly provide that the entity in question may be sued in federal court, than it is to require Congress to affirmatively grant the bistate agency a special immunity from federal jurisdiction. Thus, in a case like this, where Congress has been silent, the fact that (1) the States intended their creation to enjoy sovereign immunity, and (2) their creation remains subject to control at the state level, is determinative.

II. THE PRINCIPLES LAID OUT IN *LAKE COUNTRY ESTATES* COMPEL THE CONCLUSION THAT THE PORT AUTHORITY IS ENTITLED TO SOVEREIGN IMMUNITY

The Court's analysis in *Lake Country Estates* is consistent with the doctrine described above. The two principal inquiries identified by the Court—the States' intent to confer immunity,[12] and the source of political control of the entity—clearly militate in favor of a finding that the Port Authority enjoys sovereign immunity.

1. With respect to the first inquiry, both New York and New Jersey intended to confer sovereign

[12] In *Lake Country Estates*, the Court found it significant that the compacting States "have both filed briefs in this Court disclaiming any intent to confer immunity on" that entity. 440 U.S. at 401. In contrast, New York and New Jersey have filed a brief in this case supporting the Port Authority's claim of sovereign immunity. *See* Br. *Am. Cur.* States of New Jersey, New York, *et al.*

immunity on the Port Authority. This is demonstrated by, *inter alia*, the respective statutory provisions under which "the states of New York and New Jersey consent to suits" brought against the Authority within a one year period. *See* N.Y. Unconsol. L. §§ 7101, 7107; N.J.S.A. §§ 32:1-157, 32:1-163. Such provisions would, of course, have been unnecessary if the respective States had not intended to confer sovereign immunity on their creation.[13]

Moreover, the courts of the respective States have long regarded the Port Authority as a state agency entitled to assert the States' sovereign immunity and other sovereign prerogatives. *See Trippe v. Port of New York Auth.*, 198 N.E.2d 585, 585-86 (N.Y. 1964) (Port Authority is "a governmental agency of the States of New York and New Jersey"); *Port of New York Auth. v. J.E. Linde Paper Co.*, 127 N.Y.S.2d 155, 159 (N.Y. Mun. Ct. 1953) (Port Authority has "uniformly been held to be in the position of 'the State' whenever the issue has arisen"); *Voorhis v. Cornell Contracting Corp.*, 10 N.Y.S.2d 378, 381 (City Ct. N.Y. Co. 1938) (Port Authority is the "immediate agent of two sovereigns" and "it is hard to see how there could be a clearer instance of an agency sharing the immunity of its creators");

[13] *Amici* note that for the first thirty years of its existence, the Authority was completely immune from suit. In 1951, the legislatures of New York and New Jersey provided for a partial waiver of the Authority's sovereign immunity by consenting to suits brought within a one year period. Where, as here, Congress has not abrogated the Authority's Eleventh Amendment immunity, *see Hilton v. South Carolina Pub. Rys. Comm'n*, 112 S.Ct. 560, 563 (1991), the Court should not displace the democratic choice made by the New York and New Jersey legislatures to limit the waiver of the Authority's immunity from suit.

Miller v. Port of New York Auth., 15 A.2d 262, 266 (N.J. Sup. Ct. 1939) (Port Authority is "a direct state agency . . . an alter ego of the state . . . [and a suit against the Authority is] a suit against the state itself which would . . . be clothed with sovereign immunity . . . . "). *See also Port Authority v. Bosco*, 254 A.2d 676, 678 (N.J. Super. Ct. App. Div. 1984) (Port Authority may exercise the sovereign's exemption from statute of limitations).[14]

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[14] Petitioners also attribute great significance to the compact provisions describing the Port Authority as a "body corporate and politic" and a "body, both corporate and politic." *See* Pet. Br. 17-18 (quoting N.Y. Unconsol. Laws §§ 6404, 6407). Petitioners argue that these terms "designate[ ] an entity that is similar to a political subdivision or public corporation, and not a state." *Id.* at 18. Contrary to petitioners' assertion, the use of such terms does not mean that an entity is not an arm of the State. The Court has long recognized that "[e]very sovereign State is of necessity a body politic, or artificial person, and as such capable of making contracts and holding property, both real and personal." *Cotton v. United States*, 52 U.S. (11 How.) 228, 230 (1850). There is nothing inconsistent with having such status and retaining sovereign immunity. *See id.* at 231; *see also United States v. Hess*, 317 U.S. 537, 550 (1943).

Petitioners also argue that "the term 'bodies politic' did not refer to a sovereign." Pet. Br. 19 (citing *United States v. Fox*, 94 U.S. 315 (1876)). *Fox*, however, merely construed the terms "person" and "corporation" as used in a New York devise statute. 94 U.S. at 321. *Fox* is not relevant authority for construing the meaning of terms such as "body corporate and politic" which are used in the compact. Moreover, it certainly did not address the issue of whether the term "body corporate and politic" can, as petitioners contend, only "designate[ ] an entity that is similar to a political subdivision . . . and not a state." Pet. Br. 18. In any event, the Court's decisions in *Cotton* and *Hess* demonstrate that petitioners' reliance on *Fox* is misplaced.

2. With respect to the second inquiry, it is clear that the Port Authority is subject to the control of the respective States so as to render it one of their "arms." As *amici* explain below, the Port Authority differs in several fundamental respects from the Tahoe Regional Planning Agency, which *Lake Country Estates* held was not "an arm of the State subject to its control." 440 U.S. at 402.

First, the source of the political authority exercised by the Port Authority is that of the entire compacting States. The Port Authority represents the interests of the States and is answerable to each State at the level of statewide governance. The governing body of the Port Authority, a board of twelve commissioners, is wholly subject to state authority. The Governor of each State appoints six of the commissioners; each is confirmed by their respective state legislature; each takes the oath required of state officers and serves under terms prescribed by the state legislature. *See* N.J.S.A. § 32:1-5 (West 1990); N.Y. Unconsol. L. § 6405 (McKinney 1979). Moreover, the removal of a commissioner is vested in the respective state governments, with New York's commissioners subject to removal after a hearing by the Governor, and New Jersey's commissioners subject to removal after a hearing by the state Senate. *See* N.J.S.A. § 32:2-5 (West 1990); 1930 N.Y. Laws ch. 422.

In contrast, the Tahoe Regional Planning Agency, the entity claiming immunity in *Lake Country Estates*, was expressly established as a "political subdivision" of the compacting States. *Lake Country Estates*, 440 U.S. at 401. More importantly, the compacting States ceded direct political control over the Tahoe Regional Planning Agency to local govern-

ment, authorizing local government units, cities and counties, to appoint a majority of its governing members. *Id.*[15]

Second, the exercise of authority by the Port Authority is ultimately subject to state control and oversight. It is only after the Port Authority's rules and regulations are "concurred in or authorized by the legislatures of both States" that they become "binding and effective." N.J.S.A. § 32:1-19; N.Y. Unconsol. L. § 6419. The individual votes of the commissioners are subject to veto by the respective state governors. N.J.S.A. § 32:2-6; N.Y. Unconsol. L. §§ 7151-53. And the two state legislatures jointly direct the expenditure of any surplus revenues generated by the Port Authority. N.J.S.A. § 32:1-142; N.Y. Unconsol. L. § 7002. Thus, the Port Authority is an instrument of the compacting States, subject to their direction and control.

In contrast, in *Lake Country Estates* the Court specifically noted that the authority of the Tahoe Regional Planning Agency "to make rules within its jurisdiction is not subject to veto at the state level." 440 U.S. at 402. It further noted that California's effort to subject the entity to its control had been unsuccessful. *Id.*

Thus, the Tahoe Regional Planning Agency was largely answerable at the local level, to local constituencies, and wielded its authority independently of the compacting States. The Port Authority responds at the statewide level and remains subject to state control.

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[15] Similarly, 10 of the 17 members of the Advisory Planning Commission established by the Compact were associated with local agencies, while only one was from state government. 440 U.S. at 401 n.20.

3. Petitioners suggest that one of the factors cited by this Court in *Lake Country Estates*—namely, whether a judgment would be paid directly from the state treasury—is, or ought to be, the *sine qua non* of "stateness" for purposes of Eleventh Amendment immunity.[16] *See* Pet. Br. 33-38. But nothing in the Constitution or the federal plan suggests that the issue of payment from the State's general fund ought to be determinative of sovereign immunity. As noted above, sovereignty is ordinarily regarded as a matter of political, not financial, power. *See* pp. 6-9, 16, *supra*.

To be sure, the rule of *Ex Parte Young*, 209 U.S. 123 (1908), allowing individual capacity actions against state officials, has frequently required the Court to focus on "who pays." But the issue of who will pay is important only in determining whether a suit nominally against state officials in their individual capacities (and thus apparently beyond the reach of the Eleventh Amendment) is actually a suit against the State. *See Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recov-

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[16] The Court cited one additional factor in *Lake Country Estates*, namely that the entity was performing a function—land use regulation—traditionally performed by local government. *Amici* question whether this factor is relevant in the analysis. Just as this Court was ultimately forced to abandon as unworkable the distinction between "traditional governmental" and "proprietary" functions, *see Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545-46 (1985), a test which distinguishes between traditional state and local functions is also problematic. The use of this criterion fails to account for the flexibility which is necessary if state governments are to respond effectively to the ever-changing needs of their citizens.

ery of money from the state, the state . . . is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) ("[T]he rule [that] has evolved [is] that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."). It is of far less significance in connection with the question whether a particular entity is a state agency.

Thus, while the fact that the obligations of an entity created by bistate compact are backed up by the general treasury funds of each State might weigh in favor of a finding that a particular bistate agency is an arm of the compacting States, the absence of direct access to the State's general revenues does not indicate that the agency is not an arm of the State. Here, for example, all of the Port Authority's funds are dedicated to state governmental purposes; its use of those funds is legislatively constrained; and its spending is subject to gubernatorial veto. Moreover, the disposition of any surplus funds is expressly subject to the control of the state legislatures.[17] Whether or not those funds can be deemed part of the general treasury, it is clear that the Port Authority's use of funds is limited to the purposes for which it was

[17] The intention and expectation at the time of the Compact clearly was to generate sufficient revenues to allow the Port Authority to be self-sustaining. That no automatic access to general tax revenues was given to the Port Authority only served to emphasize (and reinforce) that the entity was expected to generate sufficient revenue to sustain itself. Any additional revenues from the States would have to be separately appropriated. A State can set up such self-sustaining entities to handle state functions without surrendering those entities' immunity from suit.

established and continues to be subject to political control exercised by both States.

While a judgment against the Port Authority is not payable from each State's respective general revenues, to say that such a judgment is not against the States within the meaning of the Eleventh Amendment elevates form over substance. The people of New York and New Jersey have decided that it is in their common interest to create the Port Authority as a joint agency to carry out important governmental functions. Any judgment payable from the Port Authority's funds limits the agency's ability to carry out the programs which the respective state legislatures have decided to be in the commonweal. Such judgments would clearly interfere with the sovereign choices of the people of New York and New Jersey. *Cf. Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("The genius of our government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires."). Accordingly, the Court should uphold respondent's defense of sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Port Authority Trans-Hudson Corporation, a wholly owned subsidiary of a bi-state agency created by interstate compact, is entitled to sovereign immunity from suit in federal court under the Eleventh Amendment.

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INTEREST OF STATE AMICI CURIAE

The United States Constitution's Eleventh Amendment guarantees the sovereignty of the States of the Union and implements a constitutional policy maintaining a delicate balance of power between the Federal Government and the States. The question presented in this case, whether a bi-state agency created by interstate compact is entitled to sovereign immunity under the Eleventh Amendment, directly implicates the States' sovereignty and the States' fundamental constitutional guarantee of immunity from the jurisdiction of the federal judiciary. Because resolution of the issue at hand will have an impact on the Court's Eleventh Amendment jurisprudence and will most likely further define the Court's arm-of-the-state doctrine applicable to bi-state and single-state agencies, all State *amici curiae* herein have a significant and substantial interest in furthering the purposes served by the Eleventh Amendment and its protections.

In addition, *amici curiae* the States of New Jersey and New York, the parental States of Respondent the Port Authority of New York and New Jersey, have a strong interest in effectuating the sovereign immunity of this bi-state agency which was created by the two States in the furtherance of accomplishing State purposes and was intended by the two States to enjoy the States' rights and privileges.[1]

STATEMENT

1. The writ of certiorari currently before the Court originates from a summary affirmance by the Court of Appeals for the Third Circuit, 8 F.3d 811 (3d Cir. 1993), upholding two decisions by the District Court for the District of New Jersey, *Hess v. Port Authority Trans-Hudson Corp.*, 809 F.Supp. 1172 (D.N.J. 1992), and *Walsh v. Port Authority*

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[1] Factual assertions made by the States of New Jersey and New York in this brief with respect to the two States' relationship with the Port Authority of New York and New Jersey constitute solely the positions of New York and New Jersey and not of other State *amici*.

Trans-Hudson Corp., 813 F.Supp. 1095 (D.N.J. 1993), ruling that the Port Authority of New York and New Jersey and its wholly owned railroad subsidiary, Port Authority Trans-Hudson Corporation, are arms of the States of New Jersey and New York and may partake in these two States' Eleventh Amendment immunity. These decisions from the federal courts in the Third Circuit relied on *Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3rd Cir. 1987), *cert. denied*, 484 U.S. 953 (1987), which held that the Port Authority was the alter ego of its founding States.

2. The Third Circuit's position, however, is in direct conflict with the Second Circuit which held in *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628 (2d Cir. 1989), *aff'd. on other grounds*, 495 U.S. 299 (1990), that the Port Authority was not immunized by the Eleventh Amendment. While the two Circuits apply different arm-of-the-state tests, both Circuits view the "state treasury" criterion -- whether any judgment must be satisfied out of the state treasury -- as the most important consideration. In practice, however, this factor is more than *primus inter pares* and is accorded by both Circuits a dispositive role in the arm-of-the-state analysis. Consequently, when the two Circuits disagreed over the interpretation of whether the Port Authority's debts were those of its parental States, a Circuit conflict ensued.

3. The Port Authority was created in 1921 by the States of New Jersey and New York by way of an interstate compact approved by Congress. 42 U.S. Stat. 174 (1921); Ch. 151, Laws of N.J. 1921; Ch. 154, Laws of N.Y. 1921. In creating the agency, both States declared that it was established to provide the States with "great economies" that would benefit the two States. N.J.S.A. 32:1-1 (West 1963); N.Y. Unconsol. L. §6401 (McKinney 1979). The agency was created as a regional agency and as the "joint agent" of the States for purposes of exercising "public and essential governmental functions." N.J.S.A. 32:2-23.27(7),(8),(10)(West 1963); N.Y. Unconsol. L. §7201(7),(8),(10)(McKinney 1979). The two compacting States also declared that the agency should possess those responsibilities and duties which were concurred in by the

Legislatures of the two States. N.J.S.A. 32:1-8 (West 1963); N.Y. Unconsol. L. §6498 (McKinney 1979). The Port Authority's governance is conducted by a board of twelve commissioners who, in equal part, are appointed by the Governors and confirmed by the Senates of each State as provided by the laws of each State. N.J.S.A. 32:1-5 (West 1963); N.Y. Unconsol. L. §6405 (McKinney 1979). Agency commissioners may be removed from office upon the filing of charges and following a hearing before either the Governor of New York or the New Jersey Senate, depending on the Commisioner's appointing State. Chapter 422, Laws of N.Y., 1930; N.J.S.A. 32:2-5 (West 1963). The Port Authority's Compact mandates that no action by the agency will be binding unless at least three commissioners from each State vote in favor of an action, and "[e]ach state reserves the right to provide . . . for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom." N.J.S.A. 32:1-17 and 32:2-6 (West 1963); N.Y. Unconsol. L. §§ 6417, 7151 (McKinney 1979). Likewise, each State Legislature must approve the promulgation of the Authority's regulations, N.J.S.A. 32:1-19 (West 1963); N.Y. Unconsol. L. § 64197 (McKinney 1979), and the agency is required to report to each State Legislature on an annual basis. N.J.S.A. 32:1-8 (West 1963); N.Y. Unconsol. L. § 6408 (McKinney 1979). Permitting the States to further control the agency, the enabling legislation authorizes each State's comptroller to examine at any time all of the agency's books and accounts. N.J.S.A. 32:2-31 (West 1963); N.Y. Unconsol. L. § 7071 (McKinney 1979).

4. Judicial review in the state and federal courts has resulted in findings that the Port Authority is a state instrumentality. For example: *Graves v. New York, ex rel. O'Keefe*, 306 U.S. 466, 484 (1939) (the Port Authority is a "state instrumentality created by New York and New Jersey"); *Newark v. Essex County Bd. of Taxation*, 254 A.2d 513 (1969) (Port Authority is the "joint agency" of New Jersey and New York); *Trippe v. Port of N.Y. Auth.*, 198 N.E.2d 585 (1964) (the Port Authority is "a governmental agency of the States of New York and New Jersey").

5. While the debts and liabilities of the Port Authority are

not the liabilities of the two founding States and while the States do not appropriate funds to the agency, the States derive from the Port Authority significant fiscal benefits. For instance, the Port Authority has committed $106 million to be spent in tandem with the New York Department of Transportation in the development of the Oak Point Rail Freight Link in the Bronx, New York. In New Jersey, the agency is funding $27 million for the New Jersey Marine Development Program. The Port Authority's Regional Economic Development Program is authorized to allocate $200 million in each of the two States for transportation, economic development and infrastructure renewal. Pursuant to instructions from the Governors of the two states, the Port Authority's 1987-1991 five-year capital plan was amended to include an additional $250 million for infrastructure projects that the States identified as critical to the region. Absent these Port Authority resources, the States of New Jersey and New York would have to obtain other funding sources in order to fulfill their needs in the Northern New Jersey-New York City metropolitan area region.

6. The States of New Jersey and New York have created the Port Authority as an instrumentality and agency of the two States and herein submit that the agency should be deemed immune under the Eleventh Amendment.

SUMMARY OF ARGUMENT

The resolution of this dispute has profound consequences to the role of the States as constitutional sovereigns in our federal system of government. For more than one hundred years, the Eleventh Amendment and its jurisprudence have accorded the States broad sovereign immunity barring a wide class of citizens' suits against the States in the federal courts. Integrating the common law doctrine of sovereign immunity into the Eleventh Amendment's guarantees to the States, the Court has expressly ruled that the Amendment's shield extends well beyond the protection of the States' fisc as the Constitution never intended to limit the States' immunity to a narrow band of suits with only direct impact on the States' centralized treasury. Quite

the opposite, under the wide coverage afforded by the doctrine of sovereign immunity, the States have been immunized from all claims and actions regardless of the situs of their financial impact except for a few instances where notions of federal supremacy demand otherwise.

While the Court's leading arm-of-the-state decisions, *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979) and *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977), do not expressly provide a constitutional conceptual framework for the resolution of such disputes, the Court's list of factual factors to be considered in the arm-of-the-state analysis evinces, in the aggregate, the purpose of ascertaining whether, ultimately, an entity claiming Eleventh Amendment immunity is controlled by its parental State. Hence, the Court's arm-of-the-state test turns, in toto, on whether an entity is *controlled* by the State. As the Court's relevant decisions do not assign a preeminent status to any one factor utilized in the arm-of-the-state analysis, the transformation by the lower courts of the Court's overall State control test into an examination most heavily concerned with determining the existence of direct accounting-like impact on the States' centralized treasury is a misinterpretation of the Court's analysis and contradicts underlying tenets of Eleventh Amendment jurisprudence.

ARGUMENT

A. FOR OVER A CENTURY, THE COURT'S ELEVENTH AMENDMENT JURISPRUDENCE, BASED ON PRINCIPLES OF FEDERALISM AND THE STATES' SOVEREIGN IMMUNITY, HAS CURTAILED THE AUTHORITY OF THE FEDERAL JUDICIARY AND HAS IMMUNIZED THE STATES FROM SUITS BY CITIZENS REGARDLESS OF WHETHER A MONEY JUDGMENT PAYABLE FROM THE STATE TREASURY WAS IMPLICATED

1. The Eleventh Amendment Provides the Sovereign States of the Union a Broad Fundamental Constitutional Guarantee Ensuring Freedom From Citizens' Suits in the Federal Courts

For more than one hundred years, this Court has consistently viewed the Eleventh Amendment as a pillar of our nation's federal structure and has ruled that in resolving disputes under the Amendment the Court "must be guided by 'the principles of federalism that inform Eleventh Amendment doctrine.'" *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)). Integral to these principles of federalism is the doctrine of sovereign immunity, which the Court described as "deeply embedded" and performing "a vital role" in our federal system, *Welch v. Dept. of Highways & Public Transp.*, 483 U.S. 468, 474, 488 (1987); *Pennhurst* at 465 U.S. 99. "Sovereign immunity is a common law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence." *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973) (Marshall, J., concurring in result). Under the Court's Eleventh Amendment jurisprudence it is thus "the doctrine of sovereign immunity, rather than the text of the Amendment itself, which is critical to the analysis of

any Eleventh Amendment problem," *Pennhurst* at 465 U.S. 142 (Stevens, J., dissenting), and "[t]his Court has drawn upon principles of sovereign immunity to construe the Amendment." *Port Authority v. Feeney*, 495 U.S. 299, 304 (1990).

The Eleventh Amendment was ratified with the intention of overruling *Chisholm v. Georgia*, 2 Dall 419, 1 L. Ed 440 (1793) and is an explicit limitation curtailing the powers of the federal courts over the States, *Missouri v. Fiske*, 290 U.S. 18, 25. [2] While the Amendment was narrowly tailored to overrule *Chisholm*, the "Court has recognized that its greater significance lies in the affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority under Art. III." *Pennhurst* at 465 U.S. 98. In the watershed case of *Hans v. Louisiana*, 134 U.S. 842 (1890), the Court held that, notwithstanding the Amendment's limited express exclusion of suits against a State by citizens of other States, the Amendment also barred the federal judiciary from entertaining suits brought by a citizen against her own State. In reaching this result, which relied on the substance and purpose of the Amendment rather than its overt language, the Court curtailed the authority of the federal judiciary to entertain a broad class of suits against the States.

In *Hans*, the Court determined that the States were vested with sovereign immunity at the outset of the Union's formation and that this immunity was not relinquished to the

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[2] Relying on the language of Article III, §2 of the Constitution, the Court ruled in *Chisholm* that it possessed original jurisdiction over a suit by a South Carolina citizen against the State of Georgia. This decision was received in the Union with "such a shock of surprise" that the Eleventh Amendment was proposed at the next meeting of Congress in 1795 and ratified by the States' legislatures in 1798. *Hans v. Louisiana*, 134 U.S. 1, 10 (1889). The text of the Amendment provides that: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."

central government. *Id.* at 134 U.S. 10. The Eleventh Amendment was thus viewed by the Court as clarifying the Framers' intentions and restoring the original understanding that the States could not be unwillingly haled into federal court. *Pennhurst* at 465 U.S. 98 n.7. For more than a century, the Court has consistently followed in the footsteps of this "expanded immunity doctrine," *Parden v. Terminal Railway of The Alabama State Docks Department*, 377 U.S. 184, 187 (1964), as charted by *Hans*. Without wavering, it has repeatedly affirmed that the Eleventh Amendment embodies a "broad constitutional principle of sovereign immunity," *Welch* at 483 U.S. 486, designed to serve as a guarantee of the States' sovereign rights. *Welch* at 483 U.S. 493-94. Indeed, this Court has declared that the Amendment established constitutional policy and sets forth an explicit limitation on federal judicial power of "such compelling force," *Edelman v. Jordan*, 415 U.S. 651, 677 (1974), which provides the States with no less than a "fundamental constitutional protection." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, __ U.S. __, 113 S.Ct. 684, 688 (1993).

2. Consistent with Principles of Federalism, the Court has Recognized that the Constitution Created Strong States whose Interests Must be Balanced with those of the Central Government

Part and parcel with the Court's recognition of the embodiment of sovereign immunity prerogatives within the Eleventh Amendment is the Court's recognition of the unique position held by the States as sovereigns in our constitutional confederation and that the States' "constitutional role . . . sets them apart from other employers and defendants." *Welch* at 483 U.S. 477. As members of a Union of coequal sovereign states operating under the principles of constitutional federalism, the common law doctrine of sovereign immunity has evolved and has been imbued with added significance under the Eleventh Amendment. In *Atascadero State Hospital and California Department of Mental Health v. Scanlon*, 473 U.S. 234 (1985), the Court noted that the States' Eleventh Amendment's sovereign immunity guarantee against suit in

federal court served to maintain the mandated constitutional balance of power between the States and the Federal Government. *Id.* at 473 U.S. 242. The Court underscored that "the States played a vital role in our system and that ***strong state governments*** were essential to serve as a 'counterpoise' to the power of the Federal Government." *Id.* at 437 U.S. 238 n.2; emphasis added. This balancing of State and Federal powers, the Court found, was designed to ensure the protection of "fundamental liberties," *Id.* at 473 U.S. 242, as well as to accord the States their due respect as sovereign members of the federation. *Puerto Rico Aqueduct* at 113 U.S. 689.

The presence of strong state governments in our constitutional order is required not only by juridical precepts of common law sovereign immunity but also because of the functional nature of American federalism. As the Court wrote in *Garcia v. San Antonio Metro.*, 469 U.S. 528 (1985):

> The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else -- including the judiciary -- deems state involvement to be." [*Id.* at 469 U.S. 546.]

To effectuate the constitutional balance between the powers of the States and the Federal Government, the Court has declared that a sovereign state must be "free from [federal] judicial compulsion in the carrying out of its policies within the limits of the Constitution," *Great Northern Life Insurance Company v. Read*, 322 U.S. 47, 52 (1943). As the Court stated:

> The principle of immunity from litigation assures the states and the nation from unanticipated intervention in the processes of government. . . . The history of sovereign immunity and the practical necessity of unfettered freedom for government from

> crippling interferences require a restriction of suability to the terms of the consent, as to persons, courts and procedures.[*Id.* at 322 U.S. 54-55.]

In short, effectuating the Constitution's general policy that the States are sovereign and not suable without their consent, the Court has ruled that no citizen's suit may be brought against the States in the Federal judiciary except as required by principles of federalism as subsumed within the Court's narrow exceptions to the general rule.[3]

3. Consistent With Principles of Sovereign Immunity and Federalism, the Eleventh Amendment Immunizes the States Even Where the Sovereign's Treasury is Not Directly Implicated

Consistent with these views of a federal system composed of strong sovereign states and in tandem with the

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[3] While the Court has repeatedly held that the States remain vested with sovereign immunity under the Eleventh Amendment, the common law doctrine of sovereign immunity, existing prior to 1788, which provided an absolute bar to suit against the sovereign, was modified in order to accommodate principles of federalism. *Employees, supra*, at 411 U.S. 288 (1973) (Marshall, J., concurring in result). In this regard, the Court has, for instance, held: that the States' Eleventh Amendment's sovereign immunity may be abrogated by Congress pursuant to the enforcement provisions of §5 of the Fourteenth Amendment, *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), but only upon a showing of unequivocal expression of intent by Congress to overturn the constitutionally guaranteed immunity of the States, *Pennhurst, supra*; that a state official may be prospectively enjoined from enforcing an unconstitutional action, *Ex Parte Young*, 209 U.S. 123 (1907); and, that in waiving its immunity and consenting to suit in federal court the Eleventh Amendment does not bar an action against a State, *Clark v. Barnard*, 108 U.S. 436 (1883), but the State's waiver must be stated by the most express language, *Edelman v. Jordan*, 415 U.S. 651 (1974). In balancing the Federal and State constitutional interests, however, the Court has recognized "that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst* at 465 U.S. 105.

Court's incorporation of traditional sovereign immunity principles into the Eleventh Amendment, the Court's jurisprudence has categorically rejected the argument that the Eleventh Amendment was intended to immunize the States in certain respects but not others, save for the narrow exceptions relating to aspects of federalism noted above at footnote 3. As such, the Court's jurisprudence does not support the notion advocated by Petitioners and their *amicus* that the intent of the Eleventh Amendment was only, or even primarily, to safeguard the States' treasuries from suits in the federal courts. Quite the opposite, the Court's jurisprudence has viewed the Amendment's protection broadly as encompassing any and all suits against the sovereign States on the basis of traditional common law principles of sovereign immunity. Explaining the rationale for the traditional common law doctrine of sovereign immunity, Justice Holmes wrote for the Court: "[a] sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907). Furthermore, "the general rule of sovereign immunity, is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury ***or*** domain, ***or*** interfere with the public administration,'[citation omitted] ***or*** if the effect of the judgment would be 'to restrain the Government from acting, or compel it to act.'" *Dugan v. Rank*, 372 U.S. 609, 620 (1963)(quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949); emphasis added.) *See*, *Pennhurst* at 465 U.S. 101, n.11 relying on the traditional sovereign immunity rule in Eleventh Amendment analysis. Plainly stated, the perquisite of sovereignty leads to immunity from any challenge to the authority of the sovereign's laws, not only challenges which directly endanger the sovereign's fisc.

Indeed, the express language of the Eleventh Amendment itself indicates that the States were intended to be immunized in all suits and challenges as was the case under the common law. The Amendment provides that the States be immunized from "any suit in law or equity," a clear

demonstration that ***any and all*** -- not simply a selection of some -- suits in law or equity against the states were intended to be the subject of the immunity.[4] In interpreting the meaning of the term "suit," the Court has made it clear that the Constitution's purpose was to immunize the States from a broad class of actions, not simply actions for money damages impinging directly against the States' treasuries:

> 'What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice. . . . To commence a suit is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. By a suit commenced by an individual against a State, we should understand process sued out by that individual against the State for the purpose of establishing some claim against it by the judgment of a Court; and the prosecution of that suit is its continuance.' [*Missouri v. Fiske*, at 290 U.S. 26-27 (1933) (quoting *Cohens v. Virginia*, 19 U.S. 264, 407-408 (1821).]

Quite obviously, the definition of "suit" under the Court's Eleventh Amendment jurisprudence is broad in scope and includes any claim, demand or request made against a State whether it impacts upon the States' treasuries or otherwise infringes on "public administration," *Dugan, at 372 U.S. 620.*

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[4] Under the Court's expansive reading of the Amendment's protection, the Court has ruled that the Amendment also extends to actions other than those in law and equity: *Ex Parte New York*, 256 U.S. 490 (1921)(admiralty); *Blatchford v. Native Village of Noatak and Circle Village*, 111 S. Ct. 2578 (1991)(Native American tribes); and, *Monaco v. Mississippi*, 292 U.S. 313 (1934) (claims by foreign governments).

Notwithstanding the fact that the motive for the adoption of the Eleventh Amendment at the conclusion of the eighteenth century was to quiet concerns relating to the prosecution in Federal courts of the States' war debts,[5] the Court has ruled without equivocation that this historical motive is of no moment to the Amendment's jurisprudence:

> The fact that the motive for the adoption of the Eleventh Amendment was to quiet grave apprehensions that were extensively entertained with respect to the prosecution of State debts in the Federal courts ***cannot be regarded . . . as restricting the scope of the Amendment to suits to obtain money judgments. The terms of the Amendment, notwithstanding the chief motive for its adoption, were not so limited.***[*Fiske* at 290 U.S. 27.]

More recently, in *Cory v. White*, 457 U.S. 85 (1982), the Court reiterated that the Eleventh Amendment must not be construed as immunizing the States only in specific suits where liability must be paid from the state treasury: "*Edelman* recognized the rule 'that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment [citation omitted], ***but never asserted that such suits were the only ones so barred.***" *Cory* at 457 U.S. 90, n.2; emphasis added. Leaving absolutely no doubt that the Eleventh Amendment cannot be relegated to actions which only impose liability on the state treasury, the Court declared:

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[5] As pointed out by the Court in *Cohens, supra*: "It is a part of our history, that, at the adoption of the constitution, all the states were greatly indebted; and the apprehension that these debts might be prosecuted in the federal courts, formed a very serious objection to that instrument. Suits were instituted; and the court maintained its jurisdiction. The alarm was general; and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the state legislatures." *Cohens* at 19 U.S. 406.

> ***Edelman did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought.*** . . . To adopt [a] rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself. *Edelman* did not embrace, much less imply, any such proposition. [*Cory* at 457 U.S. 91-92; emphasis added.]

These words by the Court in *Cory*, *Dugan* and *Fiske* directly negate petitioners' argument in Point II of their brief which suggests that the *raison d'être* of the Eleventh Amendment is only to protect public funds "in the state treasury" regardless of any other impact on the States. The Eleventh Amendment and its jurisprudence clearly reject such a narrow reading which would reduce the Amendment's "fundamental constitutional protection" accorded to the States to a rote bookkeeping examination as to exactly where a State will feel the financial pinch of a judgment against it or one of its agencies.

This unequivocal language by the Court leaves no room to argue, as petitioners do, that *Edelman* and *Ford Motor Company v. Dept. of Treasury of State of Indiana*, 323 U.S. 459 (1945), stand for the proposition that all suits against the States will be barred only if their impact will be felt directly on the State's centralized treasury. *Edelman* and *Ford* are distinguishable cases involving personal defendants employed by State offices whose budgets depended on the general fund as opposed to other accounts established by the States.

B. THE COURT'S RULINGS IN *LAKE COUNTRY* AND *MT. HEALTHY* DID NOT ASSIGN PREEMINENCE TO THE "STATE TREASURY" FACTOR, A CRITERION WHICH LOOKS TO WHETHER THE CENTRALIZED TREASURY OF A STATE IS DIRECTLY RESPONSIBLE FOR ALL AGENCY JUDGMENTS, BECAUSE THE COURT ULTIMATELY CONSIDERED WHETHER AN AGENCY, IN TOTO, IS CONTROLLED BY THE STATE AND THIS RESULT IS CONSISTENT WITH ELEVENTH AMENDMENT PRINCIPLES OF SOVEREIGN IMMUNITY AND FEDERALISM AND THE COURT SHOULD NOW SO REAFFIRM

Consistent with the Eleventh Amendment's principles of sovereign immunity and federalism, immunity available to the States is similarly available to the States' agencies. Reciting the general rule, this Court stated, "[a] suit generally may not be maintained directly against the State itself, ***or against an agency or department of the State***, unless the State has waived its sovereign immunity." *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982); emphasis added; *Edelman, supra*; *Ford Motor Company v. Department of Treasury of the State of Indiana*, 323 U.S. 459 (1944). As state *amici* describe herein, the test for determining whether a state agency is the *alter ego* of the state is whether the state controls the agency, directly or indirectly, and the agency acts to further state policies.

1. THE COURT'S DECISION IN *LAKE COUNTRY* FOCUSED ON WHETHER AN AGENCY, IN TOTO, IS STATE-CONTROLLED WITHOUT ENDOWING ANY ONE SPECIFIC FACTOR WITH PRIMACY OVER OTHER FACTORS

In *Lake Country Estates v. Tahoe Planning Agcy.*, 440 U.S. 391 (1979), the Court addressed the question of whether a regional planning agency created by compact between the States of California and Nevada was entitled to immunity

under the Eleventh Amendment. At issue in the case were allegations by property owners that, in promulgating a land use ordinance, the Tahoe Regional Planning Agency ("TRPA") and its members had engaged in an unlawful taking. This Court reversed the Court of Appeals for the Ninth Circuit, ruling that because TRPA was more comparable to a county or municipality it was not entitled to partake in the States' immunity. In so ruling, the *Lake Country* Court considered a number of factually-based questions, enumerated below, to reach its decision: (1) was TRPA created as a "separate legal entity"; (2) was TRPA a "political subdivision"; (3) who appointed TRPA's governing members; (4) where did TRPA's funding come from; (5) was the "state's treasury" directly responsible for judgments against TRPA or would a judgment against the entity have "essentially the same practical consequences as a judgment against the State itself"; (6) was TRPA engaged in a function traditionally performed by local governments; (7) was TRPA subject to a veto from its founding states; and, (8) was TRPA subject to the control of the founding states. *Id. 440 U.S. 401-402.* [6] The Court also noted that absent "good reason" to believe that the States structured TRPA to enjoy the States' constitutional protections, the agency would not be immunized.

In answering these questions, the Court concluded that TRPA was created as a separate legal entity and as a "political subdivision," with six of its 10 governing members appointed by counties and cities; TRPA's funding was provided by counties, and its liabilities were not binding on either State; TRPA performed traditional local functions, was not subject to the States' veto and the States had to resort to litigation to control TRPA.

The *Lake Country* Court did not assign any one criterion a preeminent role over the others even though, in the

[6] While eight factors are enumerated herein, some lower courts have combined some of these factors and refer to six factors as originating out of *Lake Country*.

aggregate, the Court ultimately focused on the solitary question of whether the States controlled TRPA or whether it enjoyed autonomy from the State.[7] In weighing the factors, the Court thus apparently concluded that because TRPA was controlled by the counties -- financially **and** politically -- it was not eligible to be immunized under the Eleventh Amendment even though it was originally founded by two States.[8]

While *Lake Country* listed factors for distinguishing between the characteristics of a state and a local entity, the Court was silent in supplying a conceptual framework for the resolution of arm-of-the-state questions and did not clearly anchor its decision to the precepts of Eleventh Amendment jurisprudence. In so doing, as one commentator put it, "the Court perpetuated the ambiguities surrounding the arm-of-the-state doctrine by failing to explain the purpose underlying its effort to define the entities and by neglecting to rank the criteria according to their determinative value." *Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine*. 92 COLUM. L. REV. 1243, 1264 (1992). Consequently, in applying the *Lake Country* framework, the Circuit Courts of Appeals have developed a variety of arm-of-the-state tests with wide differences in their application and results.

While some of the Circuit Courts of Appeals look at *Lake Country* for guidance, other courts have sought direction

[7] Items 1, 2, 3, 7, and 8 above clearly address issues of TRPA's State control and vast autonomy from the States. In context with these "control" factors, Items 4 and 5, while relating to financial questions, nevertheless answer who is ultimately in control of TRPA's resources. In TRPA's case, the Court found that the counties had control over TRPA's governance and its funding.

[8] Unlike the writ now before the Court involving the Port Authority of New York and New Jersey, in *Lake Country* TRPA's founding States, California and Nevada, affirmatively disclaimed any intent to confer immunity on TRPA.

from *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In *Mt. Healthy*, the Court ruled that, in spite of large financial contributions from the State to a school district, the State had no direct control over the district -- having only "some guidance" powers over the entity -- and the district's ability to raise money independently through taxes and bonds outweighed the State's ability to control the district through its large contributions. In *Mt. Healthy*, the Court listed four factors which it used in its arm-of-the-state analysis: (1) the state law designation of school districts as political subdivisions; (2) the degree of supervision by the State over the school district; (3) the level of funding received by districts from the State; and, (4) the ability of the district to generate revenue through bonds and taxes. Quite clearly, in its analysis the *Mt. Healthy* court, like the *Lake Country* Court, focused at the ultimate control exercised by the State over its agencies.

2. THERE EXISTS AMONG THE CIRCUITS A MULTIPLICITY OF ARM-OF-THE-STATE TESTS WHOSE APPLICATION HAS PRODUCED INCONSISTENCIES IN THE ADMINISTRATION OF THE ELEVENTH AMENDMENT'S FUNDAMENTAL CONSTITUTIONAL PROTECTION

While the Circuit Courts of Appeal often cite *Lake Country* or *Mt. Healthy* as support for their holdings in arm-of-the-state cases, each Circuit employs a different test and most have adapted factors which differ across the Circuits and, at times, are accorded, on a case-by-case basis, varying application.[9] The vast majority of Circuits, however, have

[9] The First Circuit's arm-of-the-state test employs a seven-factor formula, *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Authority*, 991 F.2d 935 (1st Cir.1993). The Second Circuit a six-prong test, *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628 (2nd Cir.1989), *aff'd on other grounds*, 495 U.S. 299 (1990). The Third Circuit's nine-prong test was folded into a three-part test, *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3rd Cir.1989), *cert. denied*, 493 U.S. 850 (1989). The Fourth Circuit uses the *Mt. Healthy* four-prong (continued...)

concluded that the state treasury factor is the most important factor to be considered in the arm-of-the-state analysis and, in practice, have generally accorded this factor dispositive weight. Demonstrative of the confusion which exists in the Circuits is the status of the Port Authority as viewed by the Second and Third Circuits.

The Third Circuit's arm-of-the-state test applied in *Port Authority Police Benevolent Ass'n v. Port Authority of New York and New Jersey*, 819 F.2d 413 (3rd Cir. 1987), used a nine-factor test, using three additional factors outside of *Lake Country*, originating from *Urbano v. Board of Managers*, 415 F.2d 247 (3rd Cir. 1969), *cert. denied*, 397 U.S. 948 (1970). In contrast, the Second Circuit's test in *Feeney v. Port Authority Trans-Hudson Corporation*, 873 F.2d 628 (2nd Cir.1989), *aff'd on other grounds*, 495 U.S. 299 (1990), broadly invoked the *Lake Country* factors but accorded the state treasury factor preeminence. *Id.* at 873 F.2d 631.

[9](...continued)
test, *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir.1987), and *Ram Ditta v. Md. Nat. Capital Park and Planning Comm'n.*, 822 F.2d 456 (4th Cir. 1987). The Fifth Circuit uses a six-factor test different from the one used in *Lake Country*, *Delahoussaye v. City of New Iberia*, 937 F.2d 144 (5th Cir. 1991). The Sixth Circuit employs what appears to be a four-part test, *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir.1993), *cert. denied*, 114 S Ct. 1071 (1994). The Seventh Circuit employs a different four-factor test, *Benning v. Bd. of Regents of Regency Universities*, 928 F.2d 775 (7th Cir.1991). The Eighth Circuit most recently appeared to rely on the nine-part test which the Third Circuit had used before modifying its test to a three-large-factors test, *Sherman v. Curators of University of Missouri*, 16 F.3d 860 (8th Cir. 1994). The Ninth Circuit utilizes a five-part test, *ITSI TV Productions v. Agricultural Ass'c.*, 3 F.3d 1289, 1292 (9th Cir.1993); *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1423 (9th Cir. 1991). The Tenth Circuit used a two-part test and has subsequently adopted the *Mt. Healthy* factors, *In Ambus v. Granite Bd. of Educ.*, 995 F.2d 992 (10th Cir. 1993). The Eleventh Circuit engages a three-part test, *Robinson v. Georgia Dept. of Transp.*, 966 F.2d 637 (11th Cir.1992), *cert. denied*, 113 S Ct. 660 (1992). Lastly, the D.C. Circuit utilizes a test composed of the *Mt. Healthy* and *Lake Country* standards. *Morris v. Washington Metro Area Transit Authority*, 781 F.2d 218 (D.C. Cir. 1986).

Applying their respective tests to the same agency and examining the same facts, both Circuits arrived at opposite conclusions: While the Third Circuit's analysis concluded that the limits imposed by the States on the agency indicated that it was not an independent corporation, the Second Circuit determined that there was no significant difference between TRPA's independent status in *Lake Country* and the Port Authority's independence from its parental States. Additionally, applying the state treasury factor to the Port Authority, the Second Circuit held that the agency's liabilities were insulated from the States' central treasuries whereas the Third Circuit concluded that, even though the Port Authority was self-sufficient, the Authority "would be able to go to the state legislature" to recoup needed funds and this "indirectly . . . could have some impact" on the States' treasuries.

While the Third Circuit's analysis applied an "indirect impact" state treasury test to the Port Authority, two years later in *Fitchik v. New Jersey Transit Rail Operation*, 873 F.2d 655 (3rd Cir. 1989), *cert. denied*, 493 U.S. 850 (1989), the Third Circuit, using the same *Urbano* test, ruled that New Jersey's mass transit agency was not the arm of New Jersey. This result was reached even though the agency was represented by the State Attorney General, had all its Board actions subject to the State's Governor's veto, had its governing board appointed by the Governor and legislature and, had been treated by state law as a State agency. The Third Circuit's rejection of sovereign immunity in *Fitchik* relied most acutely on the reasoning that the liabilities of the agency were not paid out of the State's treasury. The court reached this result even though the State's railroad was the recipient of over $150 million of State subsidies which originated directly from the State's general fund.

The inconsistencies in the lower courts' arm-of-the-state rulings can also be detected by the different treatment accorded similar type of agencies across the circuits. For instance, while the Third Circuit concluded that New Jersey's railroad was not immunized, *Fitchik, supra,* the Ninth Circuit recently ruled that Alaska's railroad was the alter ego of Alaska. *Alaska Cargo Transport. v. Alaska RR,*, 5 F.3d 378

(1993). Notably, in divergence from its own heavy reliance on the state treasury factor, the Ninth Circuit granted the State's railroad immunity because of the likelihood that the State would cover the agency's liabilities even though Alaska was not directly liable for money judgment against the railroad. With respect to state universities, the lower courts' decisions are equally confusing with one university granted immunity in one part of the country while a similar institution elsewhere is not. *Compare*, *Fuchilla v. Layman*, 537 A.2d. 652 (N.J. 1988), *cert. denied*, 488 U.S. 826 (1988) (state subsidized and controlled university not immune) and *Kashani v. Purdue University*, 813 F.2d 843 (7th Cir. 1987) (university immune as judgments would impact the State's subsidies).

3. Application of Concepts of Sovereign Immunity and Federalism to the Arm-of-the-State Analysis Must Result in the Preeminence of the "State Control" Criteria Over the "State Treasury" Factor

As demonstrated above in Argument Part "A", the Court's jurisprudence over the last century has steadfastly reiterated the policy of the Eleventh Amendment as adopting the broad principles of the common law's sovereign immunity doctrine and respecting the States' full sovereignty within the Nation's federal structure. The Court's Eleventh Amendment jurisprudence, as shown, has clearly disavowed the argument that the borders of the Eleventh Amendment are strictly defined by whether a State's treasury is encumbered by a court's money judgment. In view of this well-established jurisprudence of the Amendment, it is an incongruity in logic to conclude, as some of the Circuits have done, that the state treasury factor must be treated as paramountly dominant over all other factors in engaging in arm-of-the-state analysis.

a. The State Treasury Factor Relies on Anachronistic Views of State Governments' Role in Governing Society

The state treasury factor, as it has come to be utilized in the Circuits, holds that unless the centralized treasury of a

State is directly made responsible for a State agency's debts or judgments, that State agency cannot be deemed to be acting as an arm of the sovereign and cannot be found immunized under the Eleventh Amendment. Under this logic, the States have been forced to step into a legal straightjacket tailored on the basis of an outdated pattern and understanding of government's role in modern society: Pursuant to this logic, any activity a State engages in outside the area which historically has been viewed as "governmental," or outside the traditionally accepted structure and manner in which States have offered governmental services to their citizens in the past, is deemed to be a non-immunized activity under the Eleventh Amendment simply because of the novelty of the activity or the innovative manner of its financing by the State.

This reasoning, however, fails to evaluate the modern role and obligations of State governments and applies an anachronistic view which is no longer in sync with modern concepts of federalism and sovereign immunity. In an era where government has made a commitment to provide a myriad of services to the public, it has also had to contend with the question of how to fund such programs without enacting inequitable taxing programs. As the Court pointed out in *Anderson v. Dunn*, 6 Wheat. 204, 226, 5 L Ed. 242, 247 (1821), "[t]he science of government . . . practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." [10] Experimentation with new and innovative fiscal models and structures to finance the cost of government is, most clearly, a functional obligation of a sovereign State and such activities cannot be labeled as

[10] For instance, as the Court has pointed out, in the area of establishing and operating mental health facilities the States' role dramatically changed from no involvement at all at the time of the Nation's establishment to active participation in the modern era. *See, Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 284, n.2 (1973).

private-like or proprietary.[11] Indeed, in *Garcia*, *supra*, the Court concluded that distinguishing between "governmental" and "proprietary" functions or attempting to define "historical," "essential," "usual," "traditional" or "strictly governmental" functions is an unworkable task in view of the evolution of the States' activities in modern society. *Garcia* at 469 U.S. 540-542. As the Court said:

> The problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society.... Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes. [*Garcia* at 469 U.S. 546.]

As noted by the Court in the analogous field of state immunity from federal taxation: "It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune . . . as were engaged in by the States in 1787. Such

[11] The creation of the Port Authority by New York and New Jersey is a fitting example of how during this century state governments have, in order to exercise their police powers more effectively and efficiently, embarked on activities which in prior generations were generally viewed as nongovernmental in nature. For example, establishing economic, bank-like, redevelopment institutions to encourage regional redevelopment, operating mass transit services and facilities such as PATH and the Port Authority Bus Terminal, administering the operation of tunnels, bridges and airports and, funding the purchase of buses and capital equipment to be used by other state agencies are activities which, today, are readily viewed as governmental but were private activities a century ago. New York and New Jersey provide these activities through their agent the Port Authority, thereby deriving fiscal benefits as well as operational and administrative advantages associated with technical expertise and modern management techniques.

a static concept of government denies its essential nature." *New York v. United States*, 326 U.S. 572, 579 (1946).

Plainly, then, utilization of a preeminent state treasury factor in arm-of-the-state analysis is wholly inappropriate as it requires the federal judiciary to make certain out-of-date assumptions about how a state government should and must act in fulfilling its mission of governance. In utilizing this factor, the federal courts create an artificial dichotomy between sovereign activities, i.e., those which are financed directly out of the centralized state treasury, and all other state activities which are set aside as non-sovereign because their funding is accomplished in a nontraditional manner. Other than being hypertechnical and entirely inflexible, this factor disregards the evolution of a sovereign's obligations in this century.[12]

b. Judicial Use of the State Treasury Factor Compels the States to Relinquish their Sovereign Immunity in Order to Make Government Efficient

Quite obviously, except in the narrow instances where federal supremacy so demands, the Eleventh Amendment's tenets of sovereign immunity and federalism did not intend to compel or cajole the States into relinquishing their broad sovereignty as the price for exercising modern methods of governance. Indeed, this Court has held time and again that sovereign immunity may only be relinquished by the States upon a voluntary and unequivocal consent. *Department of Health v. Florida Nursing Home*, at 450 U.S. 150 (State's general waiver of sovereign immunity not a waiver of

[12] For example, in New York the number of public authorities jumped from six in 1960 to 36 in 1990; New Jersey had chartered 14 intrastate and five bi-state authorities by 1981; and Alaska created 10 government corporations in five years. *See, Clothing State Governmental Entities with Sovereign Immunity: Disarray in the Eleventh Amendment Arm-of-the-State Doctrine* at 92 COLUM. L. REV. 1247-1252 for a discussion of the evolution and expansion of the States' programs and their growing reliance on specialized State agencies and authorities.

Eleventh Amendment). The preemptive utilization of the State treasury factor over all other considerations in the arm-of-the-state analysis violates this rule and coerces the States into choosing between either: (1) relinquishing their sovereignty but embarking on necessary governmental tasks which may involve the conduct of fiscal or other experiments in the governance of a modern polity or, (2) guarding sovereignty at the expense of staid, inefficient and unresponsive governance. This Hobson's choice, imposed upon the States by the application of a preeminent State treasury factor, most clearly forces the States to surrender their Eleventh Amendment sovereignty or, at the very least, impermissibly imperils State sovereignty each time the States embark on a new governmental venture.

As pointed out by the Court, the States' role as social and economic laboratories cannot be properly exercised if the States are forced to "pay an added price when they meet the changing needs of their citizenry by taking up functions that an earlier day and a different society left in private hands." *Garcia* at 469 U.S. 546. The loss of the Eleventh Amendment's "fundamental constitutional protection," *Puerto Rico Aqueduct* at 688, is, indeed, a steep price for the States to pay, resulting in the intrusion and interference of the federal judiciary into the States' sovereignty and the States' public administration of policies and programs, *Dugan* at 372 U.S. 620.[13] Additionally, the involuntary loss of sovereignty inherent in the application of a preeminent state treasury factor

[13] The success of New York and New Jersey's experimentation with novel methods of governance and financing to meet emerging societal problems during this century is evident in the case of the Port Authority. As pointed out in this brief's Statement, this entity created and controlled by New Jersey and New York is a modern State governance tool designed for dealing with critical problems facing the two States. This experiment in governance not only pays its way without imposing a financial burden but also makes a positive contribution to the fiscal status of New York and New Jersey. To demand that New York and New Jersey make a choice between their sovereignty and their right to experiment with efficient governance methods is inconsistent with the Eleventh Amendment and its jurisprudence.

also deprives the States of their equally important constitutional prerogative as coequal sovereigns not to be dragged into federal court without consent. *Puerto Rico Aqueduct* at 113 S.Ct 689, n.5.

Under our federal system of government, the sovereign States of the Union were not intended to be pressured or manipulated in executing their sovereign obligations. Unless the States act in conflict with the Federal Government's supremacy powers or act in a manner inconsistent with the Constitution, the federal judiciary must not hinder the proper execution of State powers by imposing barriers, such as the loss of sovereign immunity, when the States are exercising their governance obligations as dictated by modern exigencies.

c. THE ELEVENTH AMENDMENT, ITS JURISPRUDENCE AND THE COURT'S RULING IN *LAKE COUNTRY AND MT. HEALTHY* JOINTLY REQUIRE THAT THE ARM-OF-THE-STATE ANALYSIS BE PRIMARILY FOCUSED ON STATES' CONTROL OF AGENCIES

In the final analysis, all the factors set forth in *Lake Country* and *Mt. Healthy* answer the ultimate question of who in fact controls a State agency. This reading of *Lake Country* and *Mt. Healthy* harmonizes these rulings with the intent of the Eleventh Amendment and with the Court's Eleventh Amendment jurisprudence and supplies a test doctrinally accurate and more practical in application. Should the Court accept this standard, as State *amici* strongly urge, a conceptual bright line will be laid for the lower federal courts, providing needed conceptual guidance to help steer the judiciary and the States through the waters of the arm-of-the-state doctrine.

Because the overriding principle of sovereign immunity analysis is based on the sovereign's control of its dominion, the appropriate question in arm-of-the-state analysis is whether the State controls an agency's overall direction and policies. The state treasury factor, we respectfully submit, may still be used in instances where other indicia of control are weak or unclear but should not be accorded a preeminent or dispositive role and must be seen as one of a set of instruments to be

utilized to measure whether an agency is, ultimately, controlled by its creating State. Thus, in the absence of other indicators of juridical or political control by the State over an agency, the state treasury factor, properly defined so as to shed its current preemptive character, can assist by demonstrating if the financial obligations of an agency are, ultimately, passed on to the State as a result of either legal or practical constraints. For example, where the State has in practice committed itself to appropriate resources in favor of an agency, thereby guaranteeing its survival, or where the agency is a net contributor of funds to the State, any loss of resources by the agency will inevitably impact on the State's bottom line with fewer resources available to be spent elsewhere by the State. Consequently, such a result has the "same practical consequence" as a liability imposed upon the State.

Other than for the financial deprivation which is felt by the State when a federal judgment is entered, a federal court's money judgment against a State-controlled agency forces the State to surrender an element of its control as a sovereign over its destiny; limiting its resources and thereby its choices as to whether or how to implement policies and programs. Quite simply, loss of resources as a result of federal judicial intervention against State-controlled agencies translates most clearly into a diminished level of State sovereignty and discretion.

In examining the question of a State's control over an agency, it is of importance to determine the intention of the State in creating the agency and reference to state law may answer this query. If the intention is clearly manifested on the face of an agency's enabling legislation that the agency was intended to be the State's "agent" or, for example, if the agency was created to effectuate a public policy or a particular mission on behalf of the State, a strong presumption must be created that, regardless of any other indicator -- such as the mode of funding or the juridic character of the entity -- the agency was created by the sovereign and for the benefit of the sovereign and therefore must be presumed to partake in the sovereign's immunity. Indeed, where the State directly or

indirectly, controls the agency's direction and policies through control over its governing personnel or otherwise, such as control by the State Attorney General over the agency's litigation and legal compliance, the presumption of sovereign immunity is obviously strengthened.

In the event, however, that a "clearly articulated and affirmatively expressed state declaration"[14] is not presented, resort to State decisional law may clarify the State's intentions in establishing the agency. Reference, however, to such legal factors as "sue and be sued" are not illuminating, *Smith v. Reeves*, 178 U.S. 436, 441 (1899) (a State's general consent to be sued is not an express declaration of consent to be sued in federal court). Similarly, the terminology "body politic and corporate" is of minimal utility as it has been interpreted broadly and has included municipal as well as State agencies, *Cotton v. U.S.*, 52 U.S. 230, 231 (1850) (every sovereign State is of necessity a body politic). Usage of such vague and, in some cases, outdated terms and concepts only serves to perpetuate the difficulties associated with the application of the arm-of-the-state doctrine and should be avoided.

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[14] Drawing on the analogous area of state action in antitrust law, where municipalities do not share in a State's antitrust exemption unless a showing is first made that the municiplity acted pursuant to a clearly articulated and affirmatively expressed state policy, one commentator has suggested that application of a similar test to the arm-of-the-state doctrine would introduce greater clarity, simplicity and consistency. *See* 92 COLUM. L. REV. at 1304. See *Hallie v. Eau Claire*, 471 U.S. 34, 39 (1985).

CONCLUSION

The result reached by the United States Court of Appeals for the Third Circuit holding that the Port Authority of New York and New Jersey is immune under the Eleventh Amendment should be affirmed.

Respectfully submitted,

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